LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The maintenance of an adequate supply of trained industrial and agricultural labor is a matter of stark necessity to the nation which wages total war. Yet however imperative the end, the adjustments essential to its attainment are nonetheless delicate. Experience has already shown how refractory are the problems involved in distributing scarce materials to the fabricators of the tools of war, but, once we have arrived at comparable shortages in labor supply, it is manifest that the obstacles to the efficient utilization of manpower will be still greater.

Appropriate measures of recruitment and training can augment the supply of labor and stave off crises at least for a time. But labor lacks the mobility of a commodity; to bring the man (or the thousand men) with the needed skill to the place where it is needed at the time when it is needed is not merely a problem in transportation. Variations in wage rates, the normal means of directing the flow of labor, do not operate with the requisite speed and precision; left uncontrolled, their tendency would be inflationary. In consequence a quest has begun for new controls over the employment process and relationship, and with it has come the task of adapting old controls to wartime conditions. It is with such undertakings that this symposium is concerned.

The first two articles survey the problem broadly, the former chronicling legislative and administrative measures taken by the Federal and State Governments to meet defense and then wartime needs, the latter sketching the federal agencies dealing with wartime labor problems. The third, fourth, and fifth articles are directed to the problems of labor mobilization now coming steadily to the fore. The next two inquire into the matter of wartime labor disputes, the first describing the machinery for their conciliation, the second, the "law" governing their adjudication. To these articles should be added a third which appears at the end of the symposium and which describes the procedure developed by the National War Labor Board. The prospect of change in that procedure led to a delay in the preparation of this article which has been printed out of its logical place in order to advance the date of publication.

The eighth and ninth articles enter an area where controversy has been acute. The former presents the wage and hour problem as seen by a former administrator of the federal law; the latter reports the succession of bills designed to restrict the powers and privileges of organized labor which have been introduced in the Congress since the outbreak of the war in Europe.

In few areas of wartime policy-making is foreign experience likely to be of greater significance than in the field of labor supply. The war has imposed like demands upon the economies of all the warring nations, however widely their political and social structures may vary. The two studies here presented of the responses to these demands, on the one hand, by Britain and the Dominions and, on the other, by National Socialist Germany, reveal parallels and divergencies at the successive stages of their respective mobilizations which throw light on the choices which are now opening to us.

The period during which this symposium was in preparation has been protracted, in part by delay in the periodical's publication schedule, in part by wartime demands on contributors. During this period, Professor Paul H. Sanders, who had organized the symposium, withdrew to join the legal staff of the National War Labor Board, and the editing of the individual articles was undertaken by me. The temptation to defer publication still longer to provide for treatment of such measures as may be adopted in response to the President's Labor Day message has been resisted with difficulty; it is believed, however, that what has been brought together can contribute importantly to the understanding of any new developments that may lie ahead.

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THE IMPACT OF THE WAR UPON LABOR LAW

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Labor legislation is written on a continuous scroll. The laws of the past, the great laws and the petty laws, all remain on the record, and the laws of the future must be inscribed on the same scroll. There is a continuity of interest, and even new laws appearing for the first time have a relationship to the others that makes them all part of the same social structure. Consequently, if we look for the influence of the war upon only those portions of the scroll that were written during the war, we will fail to see the full significance of the war legislation.

Indeed, we must look above the writing to the hands and the minds that have written. There are always many persons, with conflicting notions, who would make law. They struggle with one another to get their precious words upon the great scroll. And whenever one succeeds, the strife continues to have the words erased or amended. The war has altered the goals of most of the persons seeking labor legislation and has set the tone and the tempo for legislative battles.

Even beyond the legislative chambers there is a field for influence on labor law. The courts construe the law and administrators apply it in ways that are just as effective as the writing of the law. In that realm of interpreting and executing the laws, too, the war has had its peculiar effect.

If we go back to the President's declaration of a national emergency on September 8, 1939, we may discern our public preparation for an imminent war. From that time on we can trace the plans and programs for labor legislation. We can follow the legislative debates and list the laws adopted. We can note the executive orders and administrative regulations. We can observe how the courts have treated the laws. From this record, if we can eliminate the continuing force of old laws, if we can subtract the pressures of traditional groups, if we can discard the irrelevant and the incidental, we shall have the story of the impact of the war upon labor law.

I. AT THE FEDERAL LEVEL

The Political Perspective. Before attempting a detailed inspection of the war record, it might be well to view the Washington scene, glancing rapidly over the past two and a half years, so that the developments in labor law may be seen in

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their national perspective. The prominent political issues of the day, the Congressional hearings and debates, the press campaigns, the fireside chats of the President, and that uncertain climate called public opinion, all conditioned the form and character of our labor laws. A brief survey may suffice to reveal the environment in which the war program and labor law were gradually intertwined.

When in September, 1939, the President of the United States proclaimed a limited national emergency, it was to observe, safeguard and enforce neutrality and to strengthen our national defense within the limits of peace-time authorizations.[1] There was a widespread concern over neutrality and the possibilities of peace. Only slowly did the normal legislative programs of industry and labor give way to the requirements of defense and war. The outstanding labor problem in 1939 was unemployment. Industrial orders from the countries at war were regarded with an ominous hopefulness. That year also saw attacks upon the National Labor Relations Act, the Fair Labor Standards Act, and the Public Contracts Act. All of them fell just short of success. Labor began its campaign for a law to withhold government contracts from labor law violators. The LaFollette Committee launched its oppressive labor practices bill, but much more consideration was given to proposals for laws against subversive activities.

The year 1940 was an election year in which all political issues were dwarfed by months of speculation and months more of campaigning over a third term for the President. There was little preoccupation with defense during the first half of the year. The reciprocal trade agreements, an anti-lynching bill, the banning of political activity by state employees receiving federal funds, the court review of administrative decisions, and the amendment of the Fair Labor Standards Act and the National Labor Relations Act were the chief topics of Congressional consideration. The emergency situation played only an incidental role in the fundamental clashes of opinion on those subjects.

The national defense acts that followed in the latter part of 1940, contained incidental provisions affecting the application of existing labor laws. The absolute limit of the Federal Eight Hour Law was lifted to permit overtime at premium pay; and other wage and hour laws were expressly preserved. The most prominent labor law controversy of the year was a culmination of the old dispute over the National Labor Relations Act. After prolonged public debate, a lengthy Congressional investigation, bitter disagreement within the ranks of organized labor, and conciliatory overtures by new members of the National Labor Relations Board, a bill containing significant amendments to the Act was approved by the House. Because of the pending election and the diversions of the defense program no further action was taken on the bill by the Senate Committee on Education and Labor. The other major labor laws were either untouched or amended only in

[1] Proclamation of the President, No. 2352, Sept. 5, 1939, 4 FED. REG. 3851.

trivial detail. Thus by the end of 1940, Congress had dealt with only a few matters involving labor in the emergency.

The executive program of the President, however, had developed during the latter half of 1940 with certain significant labor aspects. In creating the first overall defense agency, the Advisory Commission to the Council of National Defense, the President assigned one of the seven positions on the Commission to labor. The President of the Amalgamated Clothing Workers of America, Sidney Hillman, was made its incumbent and he formed a committee representative of all the major labor organizations to counsel with him. The Commission early formulated a statement of national labor policy which was approved by the President and submitted to Congress and to all Government contracting agencies.[2] It recommended essentially the preservation of existing labor standards in the performance of Government contracts. The Advisory Commission also established functioning divisions to coordinate the efforts of the many Government agencies in the defense program. Extensive plans were devised by its labor division for the training of defense workers. Organized labor looked on suspiciously and insisted upon representation in all of the divisions of the Commission so that its interests might be adequately protected.[3]

In 1941, the defense program became the point of orientation for nearly all legislative matters. The opposition to labor legislation made a new approach through bills to curb strikes, to require arbitration, to regulate unions, to freeze wages, and to increase hours as separate defense measures. In February, the House Committee on the Judiciary commenced its hearings on bills to curtail strikes in defense industries. Messrs. Knudsen and Hillman, then co-directors of the Office of Production Management, disagreed in their testimony on the need for such legislation,[4] and the public, the press, and Congress continued the controversy for months. The appointment of the National Defense Mediation Board caused only a temporary lull in the agitation. Shortly after the middle of the year, the hearings on the price control bill[5] brought to the fore the dispute over the inclusion of wage controls. Only the constant insistence of the Administration on the separation of wage from price controls finally induced Congress to keep wages from the provisions of the Price Control Act. In other fields, the proposals of organized labor did not fare so well. The sedition and sabotage laws and the restrictive alien laws were

[2] The National Defense Advisory Commission, Statement of Labor Policy, Aug. 31, 1940, recommended the absorption of the unemployed, the payment of extra compensation for overtime, the elimination of discrimination on the basis of age, sex, race or color, the maintenance of health and safety and the observance of all labor laws.

[3] AFL, PROCEEDINGS OF 60TH ANN. CONVENTION, 1940, pp. 208, 588-591; CIO, PROCEEDINGS OF 3D CONST. CONVENTION, 1940, pp. 48-49.

[4] *Hearings before the House Committee on the Judiciary on Delays in National Defense Preparations*, 77th Cong., 1st Sess., Feb. 19, 20, 1941.

[5] *Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990*, 77th Cong., 1st Sess., Aug. 5-Sept. 25, 1941, and *Hearings before the Senate Committee on Banking and Currency on H. R. 5990*, 77th Cong., 1st Sess., Dec. 9-17, 1941.

extended over its protest. The WPA program was cut and in the field of social security there were no appreciable gains. The legislative year of 1941 was one in which organized labor fought to maintain its previously established standards.

The most significant changes in the legal status of labor during the year 1941 came through the exercise of the executive power of the President. On the 7th of January the President created the Office of Production Management, with Hillman as co-director and chief of its labor division. The activities of that division, particularly with respect to the training of labor, the alleviation of priorities unemployment, the stabilization of shipbuilding and construction, and the employment of minority groups, affected labor standards throughout the country. The reorganization of OPM and the shift of personnel to the War Production Board altered this work very little. In the realm of labor disputes, the National Defense Mediation Board was created. It succeeded in settling crucial labor disputes for several months and was then itself disrupted by the withdrawal of the CIO representatives on the issue of a closed shop for captive mines. Amid public and Congressional clamor for restrictive legislation, the President called a conference of national representatives of industry and labor who agreed to abandon strikes and lockouts and to submit their disputes to arbitration. This laid the foundation for the National War Labor Board. Throughout the year organized labor insisted upon an opportunity to participate in the defense program. The CIO urged the appointment of tripartite industry councils[6] and the AFL requested effective labor advisory committees,[7] but, denied these, they found other ways of expressing their interests through the existing agencies. The activities of the defense administration, rather than the enactment of any new legislation, was the contribution of 1941 to our body of labor law.

In the first few months of 1942 labor legislation definitely reflected the influence of the war. The first prominent proposal was to provide federal compensation for workers displaced by the conversion of industrial plants to war work. This aroused a storm of protest from the state unemployment compensation officials and was dropped. Then followed a major, though unsuccessful, effort to repeal the overtime pay requirements of federal statutes. The bills to control wages and abandon strikes, held over from previous years, were next laid to rest by the President's anti-inflation program which requested that wage stabilization and the settlement of labor disputes be left to the National War Labor Board. The creation of the War Manpower Commission and the reorganization of the WPB labor division, brought new speculation and anticipation of Government labor control. By May, 1942, it was clear that federal labor law was definitely considered part of the war program

[6] Murray, *Survey of the Steel Industry* (1941); Reuther, *500 Planes a Day* (1941); Int. Union of Mine, Mill and Smelter Workers, *Research Report on Increased Production of Vital Non-ferrous Metals for the Victory Program* (1942).

[7] AFL, PROCEEDINGS OF THE 61ST ANN. CONVENTION, 1941, pp. 141, 204, 205, 539-541; *Declaration of American Federation of Labor Policy on War* (Jan. 1942) 49 AM. FEDERATIONIST 10.

and that, although the legislative scene was calm, important labor adjustment would continue to be made through the activities of executive agencies.

This chronological view of the legislative and administrative action in the field of labor law indicates the gradual and ultimate domination of the field by the war. The war's real influence, however, may be discerned more clearly in a consideration of the specific action taken in connection with the various phases of labor law. Under the separate standards of labor we can observe what was sought to be accomplished and what was done.

Organization and Collective Bargaining. The movement to amend the NLRA reached its peak in 1940, at a time when, by mere historical coincidence, the defense program was being launched. Had labor relations been in turmoil then, the weight of the defense program might have been turned to the support of the amendments. Instead, the industrial horizon was relatively serene and the pending election made it advisable to avoid such inflammatory issues, so the defense program, together with the appointment of new personnel to the Board and the modification of some of its procedures, became a diverting influence. Thereafter, further modification of Board rulings tended to stave off the Act's opponents.[8] Moreover, the mediatory services of the Board's staff helped preserve industrial peace in defense industries. As a result, the criticisms of union activity that arose out of defense production were directed toward other laws.

The first objective of proposed legislation on union activities in defense industries was the regulation of the relationship between unions and their members. A few strikes in defense plants in defiance of the recommendations of mediators gave rise to charges of Communist leadership and the irresponsibility of most union officials. At the same time, there arose considerable notoriety over the large initiation fees charged by certain unions on defense construction projects. These occurrences led to insistent demands for regulatory legislation. The bills introduced were of several types: (1) bills requiring the registration or incorporation of unions;[9] (2) bills defining the legal responsibility of unions, their officials, and their members for wrongful acts committed in connection with strikes, picketing, and boycotts;[10] (3) bills requiring an audit and public accounting of union resources, and limiting the use of union funds;[11] and (4) bills requiring democratic procedures in the election of officers, the calling of strikes, the disciplining of members, and other union activities.[12] These bills were widely discussed but no Congressional action was taken on them.

The next union issue on which legislation was urged was that of the closed shop

[8] *Recent Trends in Construction of the Wagner Act* (1941) 10 INT. JURID. ASS'N BULL. 33, 45; AFL, PROCEEDINGS, *supra* note 7, at 113-116.

[9] In the 77th Cong., 1st Sess. (1941): H. R. 5015, 6068, 6154 and S.2042. In the 77th Cong., 2d Sess. (1942): H. R. 6444.

[10] In the 77th Cong., 1st Sess. (1941): H. R. 5015, 5218 and 5259.

[11] In the 77th Cong., 1st Sess. (1941): H. R. 4392, 5015, 5148, 5149, 6068, 6154 and S. 2042.

[12] In the 77th Cong., 1st Sess. (1941): H. R. 6068 and S. 2042.

or union security. The United States Chamber of Commerce and the National Association of Manufacturers as well as numerous other employers' organizations proposed that the status of unions be frozen for the period of the emergency.[13] The labor organizations, on the other hand, insisted that since they had abandoned their resort to strikes they were entitled to collective agreements that would assure them the continued support of all employees.[14] Although they requested closed-shop contracts, they were usually willing to accept modified forms of union security agreements. A number of bills introduced in Congress sought to freeze the *status quo*,[15] but the opposition of organized labor prevented their adoption.

The issue of the closed shop, however, had to be met more affirmatively by the defense labor relations agencies. Wherever possible, the usual methods of mediation were employed to induce the employers and unions to reach a voluntary agreement. When these did not suffice, it was necessary for some of the Government agencies to make positive recommendations of their own. The National Defense Mediation Board, attempting to deal with each case on its individual merits, recommended the closed shop in one case and a union maintenance clause in seven cases, and refused to recommend either in five cases.[16] In a few other cases it recommended preferential hiring or membership encouragements; but, in a much larger number of cases, the issue was settled by agreement between the parties. When the Board refused to accede to the demand for a closed shop in the captive mines, its CIO members withdrew and brought about its dissolution. An arbitrator to whom the dispute was referred granted the closed-shop demand. The President, however, called a conference of management and labor to set the terms of an industrial truce. The representatives were willing to forego strikes and lockouts, but the employers were reluctant to submit the issue of the closed shop to arbitration and they agreed to do so only upon the insistence of the President. To implement their agreement and to maintain peace in war industries, the National War Labor Board was created.[17]

Wages. In one of his first speeches on national defense, the President of the United States declared, "There is nothing in our present emergency to justify a lowering of the standards of employment. Minimum wages should not be reduced."[18] This was generally understood to mean that in the opinion of the President there was no need to amend the Fair Labor Standards Act, the Walsh-Healey

[13] Still affirming their opposition to the closed shop, the leading employers' associations urged that the *status quo* be maintained in the interests of national defense. Nat. Ass'n of Mfrs., *Employment Relations* (Dec. 1940) 16-22; U. S. Chamber of Commerce, *Policies 1941*, pp. 3, 15.

[14] This attitude was expressed constantly in union negotiations and, although the National Defense Mediation Board was dissolved on the closed-shop issue, the Board accepted the reasoning of the unions in recommending union security clauses. NDMB REP. (1942) (mimeo.) 14.

[15] In the 77th Cong., 1st Sess. (1941): H. R. 1403, 1814, 2694, 2695, 5218, 5696, 5738 and S. J. Res. 106.

[16] NDMB REP. (1942) app. E.

[17] Exec. Order No. 9017, Jan. 12, 1942, 7 FED. REG. 237.

[18] 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN DELANO ROOSEVELT (1940) 237.

Act, or the Davis-Bacon Act, all of which provided for minimum wage rates in defense industries. Frequently, war officials testified before Congressional committees in favor of the continuation of these acts and against other legislative wage controls. Even when urging wage stabilization, in 1942, the President advised Congress that no legislation was required. As a result, the war has produced no significant changes in federal wage legislation.

Some of the early bills for defense powers and appropriations threatened to waive the laws providing for minimum wages in the performance of Government contracts. The bills, seeking primarily to hasten the consummation of defense contracts, eliminated some of the customary restrictions on the letting of contracts, including the taking of competitive bids. Since the Davis-Bacon and the Walsh-Healey Acts inserted minimum wage rates into Government construction and supply contracts only through their inclusion in specifications for competitive bids, the bills were amended so that they expressly preserved the application of those acts.[19] The minimum wage rates were then determined in the usual manner and were inserted directly into the negotiated defense contracts. Later appropriation acts also expressly preserved the Davis-Bacon and Walsh-Healey Acts.[20] The Davis-Bacon Act itself was extended to Government construction projects in Alaska and Hawaii.[21]

The defense program, however, was a factor in the defeat of several efforts in 1939 and 1940 to enlarge the scope of the Walsh-Healey Act, primarily by increasing the number of contracts subject to its terms and by embracing subcontractors.[22] The War Department expressed its general approval of the basic act but was not disposed to approve these extensions. The Navy Department opposed the proposals on the ground that they would tend to hamper or delay its preparations for national defense.[23] One of the bills passed the Senate, but none was enacted.

The other minimum wage act of importance to war production, the Fair Labor Standards Act, was not disturbed by the war.[24] Its minimum wage requirements, limited to 40 cents an hour, became less and less objectionable to industry as the general wage levels of the country rose with war production. A serious attack made upon the hours provisions was in effect an attack only upon the payment of

[19] Act of June 28, 1940, 54 STAT. 676; Act of July 2, 1940, 54 STAT. 712.

[20] The Second Supplemental National Defense Appropriation Act of Sept. 9, 1940, 54 STAT. 872, 884, and the Appropriation Act for the Military Establishment of June 30, 1941, Pub. L. No. 139, 77th Cong., 1st Sess., provide that the Public Contracts Act shall apply to negotiated contracts by reference to such a provision in the National Defense Act of July 2, 1940, *supra* note 19. To the contrary, the First Supplemental National Defense Appropriation Act of June 26, 1940, 54 STAT. 599, and the National Defense Housing Act of Oct. 14, 1940, 54 STAT. 1125, failed to preserve the Public Contracts Act.

[21] Act of June 15, 1940, 54 STAT. 399, 40 U. S. C. §276a.

[22] S.1032 and H. R. 3331, 76th Cong., 3d Sess. (1940).

[23] *Hearings before Subcommittee No. 1 of the House Committee of the Judiciary on S.1032, H. R. 3331 and H. R. 6395*, 76th Cong., 3d Sess. (Feb., March, 1940).

[24] Act of June 25, 1938, 52 STAT. 1060, 29 U. S. C. §§201-219. This was amended to facilitate the exemption of workers covered by special union agreements, Act of Oct. 29, 1941, 55 STAT. 756, 29 U. S. C. (Supp. I) §207b(2), and to allow lower minimum wages in Puerto Rico and the Virgin Isles, Act of June 26, 1940, 54 STAT. 611, 615-616, 29 U. S. C. §§205, 206, 208n. Neither amendment was prompted by the war.

extra compensation for overtime, but the basic wage provisions of the Act remained unassailed.

In 1941, an effort to impose wage restrictions in the price control bill was strongly championed in Congress.[25] The Administration insisted, however, that wage and price controls were too different in nature to be administered successfully by the same agency, and the Price Control Act was adopted without wage restrictions.[26] However, the inflationary trend continued and wage adjustments were made under the direction of the Executive Branch of the Government. In his seven-point program against inflation, the President assured Congress and the country that wage stabilization would be undertaken by the National War Labor Board.[27] While the Board pondered this responsibility, wage limitations were effected in the shipbuilding and construction industries. In the former, the President requested the workers to forego an automatic increase under a cost-of-living clause in their earlier agreements, and, after some discussion, the unions accepted an increase smaller than that called for by their contracts.[28] Shortly thereafter the construction unions also signed a stabilization agreement with various war agencies which froze their wage rates for the duration of the war as of July 1, 1942.[29] This agreement set the prevailing wage basis for minimum wages under the Davis-Bacon Act. Determinations of new minimum wage rates under the Walsh-Healey Act and the Fair Labor Standards Act were then held in abeyance pending the settlement of a national wage policy.[30]

The War Labor Board, in the first few cases to come before it after the President's anti-inflation address, applied its stabilization policy with great caution. Wage increases necessary to prevent the pirating of workers from one war plant by another were given. Other wage issues were handled with a deliberate effort to avoid setting national policies. In the Board's "little steel" decision of July 16, 1942, however, it established three general criteria for wage adjustments, 1—the maintenance of a peace-time standard of living, allowing only a 15% increase from January, 1941, to May, 1942; 2—the raising of substandard wages, and 3—the elimination of inequalities in comparable wage rates. Further limitations upon all

[25] See note 5, *supra*.

[26] Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942).

[27] Message of the President of the United States to Congress, April 27, 1942, 88 Cong. Rec., April 27, 1942, at 3805-3807.

[28] The Shipbuilding Stabilization Committee of the War Production Board had induced the shipbuilding industry to execute regional agreements stabilizing wages, hours and grievance procedures in 1941. On May 16, 1942, at a conference called by that Committee to consider wage adjustments under those agreements, the anti-inflationary adjustment was made.

[29] Agreement between the AFL Building Trades Department and the contracting agencies of the U. S. Government, including the War and Navy Departments, of May 22, 1942, 10 LAB. REL. REP. 442. This amplified a former stabilization agreement executed in 1941, 8 *id.* 764, covering all construction financed by the Federal Government.

[30] The provisions of these acts against wage deductions were interpreted to permit deductions for war bonds and stamps. U. S. Dep't of Labor, Wage and Hour Div., Release No. 1676, Dec. 15, 1941, and Release No. 1679, Dec. 17, 1941; U. S. Dep't of Labor, Regulations under the Copeland Act, April 30, 1942.

wages, as soon as farm prices are controlled, were forecast by the President in his Labor Day message to Congress and the nation.

Hours. Since the maximum production of war goods required great freedom in scheduling hours of work, the war brought considerable pressure for the amendment or relaxation of restrictive laws. First attacked was the Federal Eight Hour Law which made no allowance for overtime in the normal construction of public works.[31] The law itself, as amended in 1917, provided that in periods of national emergency it might be suspended by the President, and this power was exercised by the President several times in 1940 and 1941,[32] primarily for the construction of island naval bases. Eventually[33] a definitive provision was enacted to permit work in excess of eight hours upon compensation at not less than one and one-half times the basic rate of pay.[34] Similar provisions for the payment of time-and-a-half pay for overtime after 8 hours a day and 40 hours a week were enacted for employees of the Panama Canal, the field services of the War Department,[35] certain employees of the Navy Department,[36] shipbuilding employees of the Maritime Commission,[37] and the employees of a Government-owned railroad.[38]

Opposition to such overtime payments, however, arose in Congress and in the press of the country, and reached a climax in February of 1942. Many bills were introduced, ranging from those which would permit unlimited hours at straight pay to bills that would require a specified workweek in excess of 40 hours in all war plants.[39] Considerable notoriety was received by a bill that sought to repeal the overtime provisions of seventeen existing hours laws, all of which required extra pay for overtime in excess of 8 hours a day or 40 hours a week.[40] Hearings were held on a similar bill before the House Committee on Naval Affairs. Representatives of war agencies testified that most war plants were operating on an average 48-hour week and that the schedule of war production did not require the

[31] Act of March 4, 1917, 39 STAT. 1192, 40 U. S. C. §326.

[32] Exec. Order No. 8623, Dec. 31, 1940, 6 FED. REG. 13; No. 8719, March 22, 1941, *id.* 1622; No. 8797, June 18, 1941, *id.* 3019; No. 8812, June 30, 1941, *id.* 3223; No. 8816, July 5, 1941, *id.* 3265; No. 8837, July 30, 1941, *id.* 3824; No. 8848, Aug. 8, 1941, *id.* 4069; No. 8859, Aug. 10, 1941, *id.* 4289; No. 8860, Aug. 20, 1941, *id.* 4289; No. 8876, Aug. 29, 1941, *id.* 4503; No. 8931, Nov. 1, 1941, *id.* 5614; No. 9001, Dec. 27, 1941, *id.* 6787; No. 9023, Jan. 14, 1942, 7 *id.* 302.

[33] In the Act of June 28, 1940, 54 STAT. 676, 679, §5(b), applicable to Government employees on Army, Navy and Coast Guard contracts, language was used which seemed to repeal the Eight Hour Law.

[34] Act of Sept. 9, 1940, §303, 54 STAT. 872, 884. This statute saved the provisions of the Eight Hour Law of June 19, 1912, 37 STAT. 1381, 40 U. S. C. §§324, 325 (1940). It apparently did not save the provisions of the Eight Hour Law of 1892, 27 STAT. 340, 40 U. S. C. §§321-323 (1940) from the broad repeal, for Army, Navy and Coast Guard contracts. See note 33, *supra.*

[35] Act of Oct. 21, 1940, 54 STAT. 1205, and Act of July 2, 1940, 54 STAT. 712.

[36] Act of June 28, 1940, 54 STAT. 676, 678, §5(a). The President vetoed an extension of this act, Cong. Rec., July 6, 1942, at 6180, but permitted a temporary 3 months' extension pending more comprehensive legislation. Pub. L. No. 652, 77th Cong., 2d Sess. (July 3, 1942).

[37] Act of Oct. 10, 1940, 54 STAT. 1092, and Pub. L. No. 46, 77th Cong., 1st Sess. (May 2, 1941).

[38] Act of June 12, 1940, 54 STAT. 348.

[39] The following bills to eliminate overtime payments were introduced in the 77th Cong., 2d Sess. (1942): H. R. 6616, 6790, 6791, 6795, 6796, 6814, 6823, 6826, 6835 and S. 2232, 2373. S. 2400 proposed the payment of overtime compensation in non-negotiable defense stamps or bonds.

[40] H. R. 6616, 77th Cong., 2d Sess., introduced Feb. 17, 1942.

abolition of overtime payment.[41] Furthermore, union agreements independently of the federal laws generally required extra compensation for overtime. Under the weight of such testimony the bill was decisively defeated and the movement was obliged to recede.

The President took advantage of the debate over the hours laws to request the unions to abandon their demands and their contract provisions for double pay for work on Sundays and holidays. Such double pay, he explained, had a retarding influence upon the introduction of continuous operations in war plants. Promptly, both the CIO and the AFL agreed to withdraw their claims when Sundays or holidays did not constitute a seventh working day in a week.[42] In the shipbuilding industry, existing stabilization agreements were changed to incorporate this agreement and many other collective bargaining agreements were revised on that basis.[43]

Some relaxation of the federal hours laws has occurred through administrative adjustments. At the request of war agencies, special exemptions from the Walsh-Healey Act were granted for contracts to supply certain canned fruits and vegetables,[44] contracts for emergency plant facilities, and contracts negotiated with states or territories for war purposes.[45] Under the Fair Labor Standards Act, the Administrator interpreted the term "hours worked" to facilitate activities essential for civilian defense.[46] Although the influence of the war was not patent, both the Acts were amended with Administration approval to permit certain exemptions from the hours requirements by bona fide collective bargaining agreements.[47] The Administrator of these acts has indicated clearly his eagerness to make whatever adjustments are needed to assure success in the war.

Employment. The defense program was begun at a time when there were from seven to eight million unemployed in the country.[48] Many extravagant estimates were made of the rapidity with which these workers would be absorbed by defense plants. Many were reemployed but the process was slow, and a new type of unemployment—priorities unemployment—appeared. The Labor Division of OPM called conferences of employers, unions, and Government officials who devised plans to distribute Government contracts to stricken plants and localities and to retrain and place the displaced workers. For a time the reemployment of these workers failed to keep pace with their displacement.

Paradoxically, while there remained a few million of unemployed and groups

[41] *Hearings before the House Committee on Naval Affairs, on H. R. 6790,* 77th Cong., 2d Sess. (March, 1942).

[42] *C.I.O. Waives Double Time to Aid U. S. War Effort,* 5 C.I.O. News, March 30, 1942, p. 1; testimony of Wm. Green, *Hearings before the House Committee on Naval Affairs, on H. R. 6790,* 77th Cong., 2d Sess. (March, 1942) 2803.

[43] *Penalty Wage for Weekend Work* (1942) 10 LAB. REL. REP. 150.

[44] Exception of the Sec'y of Labor under Walsh-Healey Act, May 14, 1942.

[45] Regulation of the Sec'y of Labor pursuant to Walsh-Healey Act, May 26, 1942.

[46] U. S. Dep't of Labor, Wage and Hour Div., Release No. 1794, April 27, 1942.

[47] Pub. L. No. 283, 77th Cong., 1st Sess. (Oct. 29, 1941). A similar amendment to the Walsh-Healey Act was approved in May, 1942.

[48] Federal Works Agency, W.P.A., Release, Sept. 4, 1941 (mimeo. 4-2266).

of displaced workers sprang up in centers of curtailed or converted production, there also developed a shortage of skilled labor in certain war plants and a shortage of certain skills throughout the land. The situation called for a dual program—the training of new workers and the placement of the unemployed.

Toward the training of the needed workers, several Government agencies bent their efforts.[49] The United States Office of Education increased the vocational training program in schools. The Department of Labor developed an apprenticeship training program. The Maritime Commission, the Civil Aeronautics Authority, the Navy, and other agencies established special training schools. OPM attempted not only to coordinate these efforts but also to develop a program to train and up-grade unskilled workers to perform semiskilled tasks, and semiskilled workers to perform special skilled tasks separated from the many duties of the thoroughly skilled worker.[50] Most of this was attempted through training within the plant. The program, requiring no legislation other than appropriation acts, was conducted as part of the war administration. Its most recent phase has been the joining of the vocational education, apprenticeship training, and in-plant training staffs under the Federal Security Agency and the chairman of the War Manpower Commission.[51] In this program organized labor insisted upon direct representation in executive positions, but so far it has been confined to advisory posts.[52]

The placement of workers in war jobs has been directed by the labor supply and training committees of WPB. They sought to coordinate the efforts of all interested Government agencies, but they relied upon the Civil Service Commission to place personnel with the Government and upon the state employment agencies to place workers with private industry. In time it became apparent that the state employment agencies were not sufficiently responsive to the needs of the National Government and, since these agencies were supported almost entirely by federal grants, the President and the Social Security Board in several lightning strokes consolidated all of them under federal control. On December 19, 1941, the President wired all the state governors that it was "essential that all of these separate employment services become a uniformly and . . . nationally operated employment service."[53] The few recalcitrants were soon given to understand that the Federal Government would either take over their employment agencies or withdraw its support and open its own agencies; and by the beginning of the next month all the state services became part of a federal system.

[49] U. S. Office of Education, *Defense Job Training* (1941); U. S. Office of Gov't Reports, *Defense Employment and Training for Employment* (1941).

[50] *The Training Within Industry Program*, OPM, LABOR DIV., TRAINING WITHIN INDUSTRY BRANCH, BULL. No. 1; *Upgrading, id.* No. 2; *Training Production Workers, id.* No. 2a.

[51] Exec. Order No. 9139, April 18, 1942, 7 FED. REG. 2919.

[52] Organized labor, early in the defense period, outlined programs for the training of new workers and demanded an opportunity to participate in their execution. AFL, PROCEEDINGS OF ANN. CONVENTION, 1940, pp. 208, 588-591; CIO, PROCEEDINGS OF 3D CONST. CONVENTION, 1940, pp. 57-60.

[53] Telegram from the President of the United States to the Governors of the States, Dec. 19, 1941.

In stark contrast to this marshalling of public employment agencies was the effort to regulate private employment agencies. The House Committee to Investigate the Interstate Migration of Destitute Citizens disclosed abuses in their operation that contributed to the confusion, instability, and exploitation of migratory and casual workers.[54] To correct this situation the Committee recommended[55] federal licensing of employment agencies engaged in interstate operations and the regulation of their advertising, their fees, and their methods of referral. The need for such legislation was further developed at public hearings, but no legislative action has resulted.

Forward strides were made by OPM and WPB toward an adequate enlistment of labor for war needs through the training and employment of women, Negroes, and other minority groups. The loss of skills and potential labor power because of the arbitrary exclusion of certain groups from industry was patently indefensible. Also, the inconsistency of struggling against the forces of race hatred abroad while we practiced discrimination in our industries at home became apparent to many. The National Defense Advisory Commission incorporated in its statement of labor policy a tenet against discrimination on the basis of age, sex, race, or color. The President submitted this to Congress,[56] and in the appropriation for defense training, Congress provided for equal treatment regardless of sex, race, or color.[57]

To implement this principle further, OPM established a Negro Employment and Training Branch and a Minority Groups Branch. Later the President appointed a Committee on Fair Employment Practice. These agencies received complaints, conducted investigations, held public hearings, and negotiated with private employers to remove discriminatory practices. In support of their work, the President required by Executive Order that every Government contract contain a stipulation against discrimination.[58]

In the training and employment of women, the Government's program proceeded very slowly. There was not only a traditional prejudice against the competence of women but also considerable confusion concerning the time when women were needed. The Administration anticipated extensive war needs and sought to start the schooling of women workers and their employment in munitions and aircraft plants at once.[59] The reluctance of schools and employers to change their habits and the disappointment of many women who found no openings were problems which were overcome only slightly. On the other hand, despite the President's

[54] *Hearings of the House Select Committee to Investigate the Interstate Migration of Destitute Citizens, pursuant to H. Res. 63, 491, 629* (76th Cong.) *and H. Res. 16* (77th Cong.).

[55] On Feb. 17, 1941, Congressman Tolan introduced H. R. 3372. He revised and reintroduced it on May 7, 1941, as H. R. 4675 and on Aug. 7, 1941, as H. R. 5510.

[56] Communication from the President of the United States to Congress, Sept. 13, 1940, H. Doc. No. 950, 76th Cong., 3d Sess.

[57] Act of Oct. 9, 1940, 54 STAT. 1035.

[58] Exec. Order No. 8802, June 25, 1941, 6 FED. REG. 1532.

[59] *Effective Industrial Use of Women in Defense*, U. S. DEP'T OF LABOR WOMEN'S BUREAU, SPEC. BULL. No. 1 (1940); *Processes on Which Women Are Now at Work in Defense Industries, id.* (Oct. 1940).

statement that there was no immediate need for the military mobilization of women, Congress hurriedly passed a law creating a Women's Army Auxiliary Corps.[60]

The War Manpower Commission approached the problems of labor training and supply with a broad authorization to "formulate plans and programs and establish basic national policies to assure the most effective mobilization and maximum utilization of the Nation's manpower in the prosecution of the war."[61] It announced early that it would establish deferments from military service for persons essential to war production,[62] and that it would make the use of the United States Employment Service mandatory for the recruitment of workers in war plants.[63] But the magnitude and complexity of its tasks have been reflected in the very gradual advance it has made in coordinating the existing agencies in its field and in developing its own administrative organization.

Strikes. Despite almost unanimous agreement upon the desirability of industrial peace in war industries, there has been an extreme divergence of opinion on the measures to obtain it. At the outset of the defense program, management and labor were urged to declare a truce, but neither was much inclined to forego any of its privileges. Gradually, with the increase of the emergency, particularly with each new aggression of Germany, the prevailing attitudes against strikes became more firm. Employers recommended their total curtailment. Labor insisted upon preserving its right to strike but agreed more and more to refrain from its exercise. Both opposed suggestions for compulsory arbitration. The forces in Congress and in the press hostile to the position of organized labor, became increasingly insistent in their demands for anti-strike legislation. The Administration, however, was committed to a policy of voluntary restraints and provided facilities for the voluntary settlement of disputes. Our declaration of war added force to the proposals against strikes, but it also brought a voluntary abandonment of the strike weapon; so the need for new legislation became less apparent and the basic law remained unchanged.[64]

There was filed in Congress a wide variety of anti-strike bills.[65] The outstanding features of most of them were gathered into an omnibus measure and adopted by the House of Representatives.[66] This measure united essentially two bills—the Smith bill containing a code of objectionable union practices, and a House Labor Committee bill establishing a Defense Mediation Board. The former sought (a) to

[60] Pub. L. No. 554, 77th Cong., 2d Sess. (May 14, 1942).

[61] Exec. Order No. 9139, April 18, 1942, 7 FED. REG. 2919.

[62] War Manpower Comm'n Release PM-3387, May 21, 1942.

[63] *Id.* PM-3481, May 28, 1942.

[64] The man-days of idleness because of strikes declined from 1,396,585 in Nov. 1941 to 476,471 in December and slightly less thereafter through March, 1942. (May, 1942) 54 MONTHLY LAB. REV., 1111, 1130.

[65] In the 77th Cong., 1st Sess. (1941): H. R. 1407, 4040, 4139, 4223, 5929, 6039, 6040, 6057, 6058, 6066, 6068, 6070, 6074, 6075, 6088, 6101, 6137, 6149, 6172, and S. 683, 1811. H. R. 4223 (Leland M. Ford), 5929 (Russell) and 6057 (Welchel) sought to make strikes in defense industries treason punishable by death.

[66] H. R. 4139, 77th Cong., 1st Sess., passed the House Dec. 3, 1941.

penalize unions whose officers were or had been Communists, Nazis, or felons, (b) to require a 30-day notice before a strike or lockout in defense employment, (c) to require a secret ballot for strikes in defense plants, (d) to prohibit new closed-shop agreements by defense contractors, (e) to prohibit interference with the acceptance or continuation of work for a defense contractor by violence, intimidation or the picketing of a worker's home, (f) to prohibit all picketing by non-employees in labor disputes over defense employment, (g) to prohibit the employment by defense contractors of persons to use force or threats against peaceful picketing, self-organization, or collective bargaining, (h) to prohibit jurisdictional strikes, boycotts, and sympathetic strikes in defense plants, and (i) to require the registration of labor organizations and the disclosure of finances, membership, officers, and such other information as might be required by the NLRB. Violators of these provisions were to be punished by a loss of rights under the NLRA, the Norris-LaGuardia Act, the Social Security Act, and the federal relief acts. The second set of provisions merely provided for a National Defense Mediation Board with powers and procedures for mediation and voluntary arbitration and with power to maintain the *status quo* for 60 days after the issuance of its order.

This bill was sent to the Senate and referred to the Committee on Education and Labor which deferred action pending the consideration by the Senate of two other bills that had been reported out favorably. One of those bills sought in cases of strikes or lockouts to extend the President's power to seize national defense plants, to preserve the *status quo* as to union recognition, and to adjust wages through the recommendations of Defense Wage Boards.[67] The other bill called for a 30-day notice prior to changes in conditions of work and routed unsettled disputes to the United States Conciliation Service, then to the National Defense Mediation Board, and then to a Labor Disputes Commission.[68] The Commission was empowered only to investigate, publish recommendations, and mediate or, upon the voluntary submission of the parties, to arbitrate the dispute. The bill also made it unlawful for an employer to agree to a closed shop under pressure of a strike. Because of industrial developments and executive action, no vote was taken by the Senate on either of these bills, and strike legislation has been allowed to rest.

The action taken by the executive branch of the Government reflected more vitally the effect of the war upon the law of strikes. The great bulk of disputes was left to the attention of the Conciliation Service of the United States Department of Labor which had long functioned on the basis of voluntary mediation. The War and Navy Departments, the Maritime Commission, and OPM established labor relations divisions to follow the labor situation very closely and to assist the Conciliation Service wherever necessary. To exert the full persuasive force of the war

[67] S. 2054, 77th Cong., 1st Sess., introduced Nov. 17, 1941, reported favorably by Senate Committee on the Judiciary on Dec. 1, 1941. SEN. REP. No. 846.

[68] S. 683, 77th Cong., 1st Sess., introduced Jan. 31, 1941, reported favorably by Senate Committee on Education and Labor on Dec. 3, 1941. SEN. REP. No. 847.

program upon those labor disputes which the Service and the active war agencies were unable to settle, the President created the National Defense Mediation Board[69] and later the National War Labor Board.[70]

These defense labor relations agencies utilized several special techniques of mediation. In some cases they employed a panel, ordinarily composed of six representatives of industry, labor, and the public, who acted separately or together in mediating disputes. The agencies also brought the disputants to Washington where prominent war administrators and military officials could be called on to impress them with the urgency of the war production program. In arbitration they used Government or impartial investigators to make field surveys of the relevant facts for the guidance of the arbitrators.

The principle of voluntary action by employers and employees was considered basic in the work of these Government labor relations agencies. The compulsory war powers of the President were brought forth only after these agencies attempted to obtain voluntary agreements and failed. The National Defense Mediation Board successfully settled all of its cases but three.[71] In these the President used troops—once to supplant workers[72] and twice to take the place of management.[73] When the CIO members of the Board withdrew, voluntary action was still requested. The President convened the national representatives of employers and employees and induced them to agree upon a continuation of facilities for the voluntary settlement of disputes without strikes or lockouts.[74] Upon that basis the National War Labor Board was created, and the Government has been obliged to enforce its decisions through plant seizure in only three instances.[74a] The no-strike agreement was followed by an increase in the number of disputes referred to mediation and arbitration, but the policy of seeking voluntary settlements has succeeded in all but an insignificant few.

Subversive Influences. Organized labor has so often been accused of subversive activities by its opponents that most legislation against subversive influences has been regarded with distrust by labor leaders. When the extension and strengthening of the federal sedition and sabotage laws and the creation of a federal criminal syndicalism law were proposed there was considerable protest from organized labor. Even those union leaders who were desirous of having more restraint upon the militant left-wing unionists wanted assurance that the new laws would not be used against all union activity.

Congress, nevertheless, proceeded to extend and reinforce existing laws against subversive activities. It was made a crime to advise, counsel, or urge insubordina-

[69] Exec. Order No. 8716, March 19, 1941, 6 FED. REG. 1532.
[70] Exec. Order No. 9017, Jan. 12, 1942, 7 FED. REG. 237.
[71] NDMB REP. (1942) (mimeo.) 7.
[72] North American Aviation Inc. case.
[73] Federal Shipbuilding Corp. and Air Associates Inc. cases.
[74] Industry-Labor Conference, Dec. 17-23, 1941, 9 LAB. REL. REP. 461.
[74a] Toledo, Peoria and Western R. R., March, 1942; General Cable Co., Aug. 1942; S. A. Woods Machine Co., Aug. 1942.

tion, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces.[75] Criminal syndicalism was more carefully defined and applied to the acts of individuals as well as conspiracies.[76] The sabotage statute was amended to cover all forms of national defense materials, premises, and utilities.[77] A new form of control was introduced in the Act requiring the registration of organizations engaged in civilian military activity when such organizations also engaged in political activity or were subject to foreign control.[78] That Act relied upon the power of publicity and sought merely to obtain information on the officers, membership, sources of funds, aims, activities, publications, and other property of such organizations.

Special legislation against subversive activities was designed for the maritime industry. Among numerous proposals the outstanding measure was an inclusive bill which sought to eliminate union hiring halls and strikes as well as to prohibit subversive propaganda at sea and to provide for the revocation of the license of subversive radio operators.[79] This was bitterly opposed by all the maritime unions and most of its proposals were also opposed by employers' associations. Out of the hearings on that bill, however, there developed a more specialized bill dealing solely with subversive activities of radio operators.[80] This was passed by the House and while it was pending in the Senate our country went to war. The Navy Department then asked for complete control of the situation and Congress adopted an amended bill which authorized the Secretary of the Navy to withhold the license of any radio operator whose presence on a ship was deemed inimical to the interests of national defense.[81]

The treatment of aliens has also been of concern to labor because of the actual and possible effects of anti-alien legislation upon the standards of American labor. The defense and war programs revived proposals to limit the employment of aliens and to deport all aliens guilty or suspected of subversive activities. Several appropriation acts prohibited the use of federal funds for the employment of aliens[82] and the special permission of the head of a Government agency was required for the employment of aliens on defense contracts.[83] After much debate and over the opposition of organized labor, Congress also passed the Alien Registration Act of 1940.[84] This law required the registration and fingerprinting of all aliens and

[75] Act of June 28, 1940, tit. 1, §1, 54 STAT. 670, 18 U. S. C. §9.
[76] *Id.* §2.
[77] Act of Nov. 29, 1940, 54 STAT. 1220, 50 U. S. C. §§101, 104.
[78] Act of Oct. 17, 1940, 54 STAT. 1201, 18 U. S. C. §§14 *et seq.*
[79] H. R. 2662, 77th Cong., 1st Sess., introduced Jan. 24, 1941.
[80] H. R. 5074, introduced June 17, 1941, passed the House, July 22, 1941.
[81] Act of Dec. 17, 1941, 55 STAT. 808, 47 U. S. C. (Supp. I) §353 note.
[82] Treasury and Post Office, 54 STAT. 55; Independent Offices, *id.* 111; State, Commerce, and Justice, *id.* 181; Dist. of Columbia, *id.* 307; Interior, *id.* 406; Labor and Federal Security, *id.* 574; Emergency Relief Appropriation Act, *id.* 611.
[83] Act of June 28, 1940, §11, 54 STAT. 676.
[84] *Id.* c. 439, 54 STAT. 670, 8 U. S. C. §§137, 155, 156a, 451-460 (1940); 18 *id.* §§9-13. The Supreme Court held a state alien registration act unconstitutional as an invasion of federal authority. Hines v. Davidowitz, 312 U. S. 52 (1941).

tightened the exclusion and deportation laws, particularly with respect to subversive activities.

Other alien controls were narrowly averted. A bill to provide for the prompt deportation of aliens engaging in espionage or sabotage and other criminal aliens was approved by both houses of Congress and vetoed by the President.[85] The veto was directed primarily at provisions in the bill which made it mandatory to deport drug addicts even though cured; but the President expressed the view that subversive aliens were deportable under existing laws, hence new legislation on that score was superfluous. Despite this view, the House passed a similar law (omitting the provision against users of narcotics) to deport alien spies, saboteurs, and felons.[86] No action was taken on this in the Senate. The Senate also passed over a bill which had been adopted by the House to exclude and deport aliens advocating any change in the American form of government.[87]

Related to these measures in spirit but much more directly affecting labor were the efforts to deport Harry Bridges, an alien of Australian birth who was president of the International Longshoremen and Warehousemen's Union and Pacific Coast representative of the CIO. Investigations of his alleged Communist affiliations begun when he led a water-front strike in 1934, were followed by a persistent effort to have him deported. In 1939 there was an unsuccessful attempt to impeach the Secretary of Labor for not having instituted deportation proceedings.[88] Within a few months a deportation hearing was held before Dean Landis of the Harvard Law School, acting as special examiner, and Bridges was released for lack of evidence of his membership in the Communist Party. The House then passed a bill to deport Bridges which the Senate rejected as unconstitutional.[89] A Supreme Court decision in another case[90] led to a new law authorizing the deportation of aliens belonging to an organization advocating the violent overthrow of government regardless of the time of membership.[91] On this basis, a new deportation hearing was held and the examiner found that Bridges was a Communist Party member and recommended his deportation. The Board of Immigration Appeals reversed this finding; but the Attorney General accepted the views of the examiner and ordered Bridges' deportation. The case is now being referred to the United States Supreme Court with all the indications of a *cause celèbre*.

Safety and Health. The need for continuous and maximum production directed attention to the importance of safety and health. Prior to the commencement of the defense program, although the Walsh-Healey Act made it a violation of Government contracts to maintain unsanitary or hazardous conditions of work, the

[85] H. R. 6724, vetoed by the President, April 6, 1940, 86 CONG. REC. 4157.
[86] H. R. 9774, 76th Cong., 3d Sess., introduced May 15, 1940.
[87] H. R. 4860, 76th Cong., 1st Sess., introduced March 8, 1939.
[88] H. Res. No. 67, reported adversely by the H. Committee on the Judiciary, March 24, 1939, 84 CONG. REC. 3273.
[89] H. R. 9766, 76th Cong., 3d Sess., introduced May 14, 1940.
[90] Kessler v. Strecker, 307 U. S. 22 (1939).
[91] Act of June 28, 1940, 54 STAT. 670, 673.

Federal Government relied upon state officials to enforce the safety and health requirements of that act.[92] In the course of the defense program, however, the Secretary of Labor appointed a National Committee for the Conservation of Manpower in Defense Industries which enlisted a voluntary staff of safety consultants from private industry and offered their advisory services to Government contractors. In 1940 Congress appropriated sufficient funds to permit the employment of a nation-wide staff of safety men so that their services might be made available to Government contractors on a full-time basis.[93] These men have been used primarily as consultants to supplement the work of state factory inspectors and other state health officials.

The war Congress both reinforced and relaxed safety laws in other special fields within its jurisdiction. In 1941 the Longshoremen and Harbor Workers Compensation Act was applied to injured employees in our island possessions and foreign naval bases.[94] For the District of Columbia Congress added industrial safety provisions to the existing minimum wage law.[95] In the realm of coal mining it adopted an inspection law which rejected punitive sanctions but which started a necessary program of investigation.[96] In the maritime industry Congress authorized the head of any agency administering a navigation or inspection law to waive compliance at the request of the Secretary of Navy or War.[97] Considerable concern was expressed by many concerning the extent to which the relaxation of safety regulations in law and in practice might hinder the war effort. These few Acts of Congress merely disclosed some of the complexities of that problem.

Social Security. In no field of labor law have the prospects of progress during the war been more promising and the results more disappointing than in the realm of social security legislation. The war economy seemed to offer an ideal soil for the growth of the social security program. The conversion of industry to the production of war goods kept cutting down the supply of consumers' goods available on the market; at the same time it kept increasing the income of workers. To avoid inflation it was necessary to siphon off some of the income, and social security taxes were believed well suited to that purpose. Moreover, the increase of social security was an assertion of the success of our way of life in the center of a cataclysmic world. So it was proposed to extend the existing social security benefits to excluded groups such as domestic, agricultural, and maritime workers, and to develop new forms of social security in the fields of public health and industrial hygiene. Unfor-

[92] Compliance with the safety, sanitary and factory inspection laws of a state was prima facie evidence of compliance with the Public Contracts Act, Act of June 30, 1936, 49 STAT. 2036, 41 U. S. C. §35 (1940).

[93] Labor-Federal Security Appropriation Act, 1942, Pub. L. No. 146, 77th Cong., 1st Sess. (July 1, 1941).

[94] Act of Aug. 16, 1941, 55 STAT. 622, 42 U. S. C. (Supp. I) §1651.

[95] Pub. L. No. 271, 77th Cong., 1st Sess. (Oct. 14, 1941).

[96] Act of May 7, 1941, 55 STAT. 177, 30 U. S. C. (Supp. I) §§4 f. *et seq.* Originally introduced in 1939, it passed the Senate and was blocked in the House Committee on Mines and Mining. Only after amendments confined it to investigations was it enacted.

[97] Pub. L. No. 507, tit. V, 77th Cong., 2d Sess. (March 27, 1942).

tunately, however, in the defense years of 1940 and 1941, Congress was preoccupied with other issues and failed to concern itself with social security legislation. On January 7, 1942, in his budget message to Congress, the President clearly set forth his desire for such legislation.[98] As yet his words have not been heeded.

The first specific effort of the Administration to obtain social security legislation on a war basis was the proposal to pay displacement benefits to workers unemployed by the conversion of industry from peace to war production. Hearings were held upon a bill to provide war displacement benefits, training wages, and travel allowances to such workers.[99] Payments were to supplement state unemployment compensation benefits by 20%, but the administration was placed under the Federal Social Security Board. In view of the recent federalization of the employment service, this bill was regarded by the state unemployment compensation officials as the beginning of a move to consolidate their agencies and to remove them from office. As a result they led a crusade against the bill that was overwhelming. Various compromises were proposed. It was suggested that the Federal Government appropriate $300 million to provide relief benefits to displaced workers[100] and reimburse the states for payments made by them to displaced workers who attended classes for war industry.[101] But these proposals were to no avail. The resistance of the state officials forced an abandonment of federal aid to war displaced workers.

In the field of old age insurance, the states were not concerned but the problems raised by the war were not very obvious, and no war adjustments have been made. One of the first problems was the possible loss of benefits because of a worker's transfer from covered employment to military service. Under the Social Security Act, old age benefits are computed at a certain percentage of the average monthly earnings of the worker during the period of his employment.[102] If he leaves covered employment, his average earnings fall and his benefits are correspondingly reduced and may be lost entirely. This situation faced the men who entered the armed forces, for their period of military service was not considered covered employment.

To cure this defect, the worker might have his status frozen as of the time he entered the armed forces, or he might be given credit for the time of his service.[103] The wage rate used for his period of military service and the contributions made therein presented difficulties but not insuperable problems. Unfortunately, no administration bill has been introduced to care for this situation. Already the survivors of some of the men killed in the war have lost the full benefit of their former contributions and many men in service and their wives still face that possibility.

[98] Message from the President of the United States to Congress, 88 Cong. Rec. Jan. 7, 1942, at 40, 42.

[99] *Hearings before the H. Committee on Ways and Means on H. R. 6559*, 77th Cong., 2d Sess., Feb. 11-17, 1942.

[100] H. R. 6639 and 6640, 77th Cong., 2d Sess. (1942).

[101] H. R. 6701 and S. 2270, 77th Cong., 2d Sess. (1942).

[102] Act of Aug. 10, 1939, tit. II, §201, 53 STAT. 1373, 42 U. S. C. §409(c) (1940).

[103] Under the Railroad Retirement Act provision was made to give credit for time served in the armed forces. Act of Oct. 8, 1940, 54 STAT. 974, 1014.

Another field of social security even more immediately affected by the war has been that of family welfare. The enlistment and induction of men with dependents left many families in need of financial assistance. To cope with this situation the Family Security Committee of the Office of Defense Health and Welfare Services proposed an extension of the Social Security Act to provide federal grants for local public assistance and a law to provide supplemental pay or family allowances to married men in the armed forces.[104] The War and Navy Departments also endorsed the suggestion of a family allowance, and after some debate over its amount and over the desirability of additional amounts for cases of dire need, Congress enacted a law providing for uniform family allowances.[105] The problem of further assistance has been left to existing agencies of relief.

Related to this situation of family need has been the problem of child care. The employment of mothers in war industries left many children with inadequate care at home. After investigation, the Children's Bureau of the Department of Labor planned community programs for the care of such children.[106] The funds available for maternal and child care under the Social Security Act were exhausted by normal needs; hence an additional appropriation was proposed for the state care of children whose mothers were working in war industries. To date, no such provision has been made.

A few minor improvements have been made in the Railroad Retirement[107] and Railroad Unemployment Compensation laws.[108] But aside from the provision for family allowances there has been no important extension of the Federal Social Security Act and no development of new social security measures during the defense or war periods.

War Powers and Appropriations. Many statutes of utmost importance to labor have not borne the label of labor legislation. The early defense acts[109] readjusted the Government's methods of doing business and conferred extraordinary powers upon executive officers. In so doing they found it necessary to reaffirm or amend existing labor laws. As indicated above, they expressly preserved the Davis-Bacon and Walsh-Healey Acts, and amended the Eight-Hour Law. A few of the first defense appropriation acts made some minor changes in labor law such as the provision for cash in lieu of vacations for War and Navy Department employees[110] and the waiver of a performance bond guaranteeing the wages of construction laborers.[111]

[104] Jeter, *Family Security and National Defense* (Dec. 1941) 4 SOCIAL SECURITY BULL. 3-6.

[105] Pub. L. No. 625, 77th Cong., 2d Sess. (June 23, 1942).

[106] U. S. DEP'T OF LABOR, CHILDREN'S BUREAU, DEFENSE OF CHILDREN SERIES; *Proceedings of Conference on Day Care of Children of Working Mothers*, 1941, *id.* PUB. No. 281.

[107] The Second Revenue Act of 1940, of Oct. 8, 1940, 54 STAT. 974, 1014, credited military service for annuity purposes under the Railroad Retirement Acts.

[108] The Act of Aug. 13, 1940, 54 STAT. 785 and the Act of Oct. 10, 1940, 54 STAT. 1094, clarified the status of coal miners and increased the benefits under the Railroad Unemployment Insurance Act respectively.

[109] See note 19, *supra*.

[110] Act of June 28, 1940, 54 STAT. 676, 679.

[111] Pub. L. No. 43, 77th Cong., 1st Sess. (April 29, 2941).

Other defense measures and the subsequent war powers acts contained authorizations for executive action that completely altered the aspect of labor law administration.

The Selective Training and Service Act of 1940[112] established rules for the return to private employment of the released inductees. The standards of living of the men in the armed services were also afforded some protection by the Soldiers' and Sailors' Civil Relief Act of 1940 which suspended the enforcement of certain civil liabilities against such persons.[113] A provision which became significant in labor disputes was the section of the Selective Training and Service Act which authorized the President to seize and operate any industrial plant if the owner refused to manufacture war supplies ordered by the War or Navy Department. This section was relied upon in the seizure of plants shut down by labor disputes.

The war also required several enabling acts which made possible extensive and important modifications in labor regulations. The First War Powers Act, 1941, gave the President broad power to redistribute the functions of all executive bureaus, to make or amend all Government contracts (without regard to certain labor statutes), and to regulate all trade or communications with the enemy.[114] Under this act, OPM was converted into WPB; the War Labor Board and the War Manpower Commission were created; the labor supply and training sections of WPB and the Department of Labor were transferred to the Federal Security Agency; and the Bureau of Labor Statistics was made more directly responsive to the Chairman of the War Manpower Commission. Another statute which authorized the President to requisition any property required for defense reinforced his power to seize strike-bound plants.[115] A miscellany of other powers was provided for in the Second War Powers Act, 1942, some of which had significance for federal labor laws such as the power to waive navigation and vessel inspection laws whenever such action was deemed necessary in the conduct of the war.[116]

The annual appropriation acts have also been of tremendous weight in the effective administration of labor laws. Through the control of administrative funds, laws of almost unlimited potentiality have been caused to stagnate, while other incidental statutory authorizations have been expanded to major fields of labor regulations. The appropriations granted such agencies as the Department of Labor, the Social Security Board, and the NLRB to administer statutes enacted prior to the defense program have been increased slightly to meet normal growth, but they have been dwarfed by the immense appropriations given those agencies and others for war labor work.[117] It is obvious that in time of war there must be a persistent effort to curtail peace-time expenditures and to convert the customary activities of

[112] Act of Sept. 16, 1940, 54 STAT. 885, 890, 50 U. S. C. §308.
[113] Act of Oct. 17, 1940, 54 STAT. 1178, 50 U. S. C. §§501-585.
[114] Pub. L. No. 354, 77th Cong., 1st Sess. (Dec. 18, 1941).
[115] Pub. L. No. 274, 77th Cong., 1st Sess. (Oct. 16, 1941).
[116] Pub. L. No. 507, 77th Cong., 2d Sess. (March 27, 1942).
[117] In addition to the increase of funds for war activities, there has been a tendency to utilize labor agencies for extraneous war work such as the use of the Wage-Hour inspection staff to detect violations of priority orders.

Government agencies to war work, but what has not been so apparent is that the provisions of appropriations acts have effected a marked change in the nature of the labor law program of the Government.

Appropriation acts have probably been most significant as labor laws in that they have provided for employment. The estimates of the persons employed by the vast war expenditures[118] are one-half a million persons in June, 1940, three and a half million in June, 1941, and eleven million at the end of May, 1942.[119] The last figure is slightly more than one fourth of our total nonagricultural employment. In contrast, the public works program of the PWA, the WPA, the CCC, and the NYA has dwindled; their budgets have been cut drastically and their functions shifted to war purposes. The most fundamental labor adjustments to the war have been mentioned in no statutes, but have been directed through the provisions of war powers and appropriations acts.

II. AT THE STATE LEVEL

The defense program was essentially a program of our National Government and it was not until after the declaration of war that the states began to make basic adjustments to the emergency. The early expansion of production and employment brought to the fore many labor problems, but the Federal Government created the agencies and the activities to deal with them. In several instances the state governors and labor law administrators were asked to confer with federal agencies on defense legislation. One of these conferences, called by the Council of State Governments with the co-operation of the United States Department of Justice, proposed a state anti-sabotage law.[120] Although bitterly opposed by organized labor and denounced by a conference of state labor administrators, the law was adopted by many states. The predominant attitude of state labor officials, however, expressed in an annual conference called by the Secretary of Labor, was that national unity and maximum production could best be assured by the maintenance of existing labor standards with as little change as possible.[121] There was considerable discussion of labor training, safety and health, and the voluntary adjustment of labor disputes in relation to national defense, but such defense measures required no new laws. The defense program, therefore, made only a slight impression upon state labor laws.

The war changed this situation. Although the National Government still dominated the emergency program, the states were called upon to make certain adjust-

[118] War expenditures increased from $1,600 million in fiscal 1940, to $6,300 million in fiscal 1941, to $22,000 million by the end of May, 1942. U. S. TREAS. DEP'T BULL. (May 1942) 6; U. S. Treas. Dep't, Daily Statement, May 30, 1942.

[119] Estimates provided by the Bureau of Labor Statistics, Occupational Outlook Division.

[120] Federal-State Conference on Law Enforcement Problems of National Defense, Washington, D. C., Aug. 5-6, 1940.

[121] *Proceedings of the Seventh and Eighth National Conferences on Labor Legislation, Washington, D. C., Dec. 9-11, 1940, and Nov. 12-14, 1941*, DEP'T OF LABOR, DIV. OF LABOR STANDARDS, BULL. Nos. 45, 52.

ments. In January, 1942, representatives of most of the state labor departments convened in Washington to confer with the Secretary of Labor and officials of the War and Navy Departments and of WPB on the need for relaxing certain state labor laws to expedite the war program. The conference concluded that laws which might hinder maximum production, such as absolute hours laws, night work laws, and Sunday work laws, should be relaxed by administrative exemptions rather than be repealed or suspended by legislative action. A uniform exemption procedure was outlined for all the states. It called for an application by the war contractor, an investigation of need by the state department of labor, and the granting of permits limited to a definite number of workers and a prescribed period of time. In emergency cases, permits might be given first and the investigation made later. These procedures were designed to meet all war needs, without hesitation, yet to avoid abuse and to preserve standards for the post-war years. It was decided tentatively that an eight-hour day and a 48-hour week were the optimum hours for war work, that safety and health laws must be enforced to avoid accidents and absenteeism, and that there was then no need to modify the state child labor laws. These standards[122] were the basis for the affirmative action taken by the states in the war program.

Hours of Work. An investigation of the state labor laws that might be considered restrictive of war production revealed laws in 44 states limiting the hours of work of women, in 20 states forbidding night work by women, in 21 states requiring one day of rest in seven, and in 38 states prohibiting work on Sunday.[123] There was general agreement that wherever a law impeded essential war work some provision should be made to waive or suspend its operation. Steps to that effect were taken in all states concerned. At times the adjustment was effected through executive action and at times through legislation.

Only eight states had regular legislative sessions in 1942 and eight held special sessions. Many bills to suspend or amend labor laws deemed obstructive of the war effort were introduced, but only a few were adopted. In New York, Virginia, and Louisiana a state labor official was empowered to grant permits waiving the labor laws that restricted hours of work. The New York and Louisiana statutes[124] authorized dispensations to facilitate employment on a seven-day or multiple shift basis as well as employment without the usual hours limitations; but the laws expressly required demonstration that exemptions were needed for maximum production of war goods, that other employees were unavailable, that other technological adjustments could not be made, and that the health and welfare of the workers were safeguarded. Dispensations were to be limited in time and might be revoked when found unnecessary. The Virginia statute[125] authorized the Commissioner of Labor

[122] U. S. Dep't of Labor Release, Jan. 27, 1942 (mimeo.) (S. 42-41).

[123] *Summary of Laws and Regulations Governing Hours of Work in Industries Manufacturing War Supplies*, U. S. DEP'T OF LABOR, DIV. OF LABOR STANDARDS (1942).

[124] N. Y. War Emergency Dispensation Act of Jan. 29, 1942, incorporated in N. Y. Laws 1942, c. 544; La. Acts 1942, Act No. 41.

[125] Va. Acts 1942, c. 105.

to permit the employment of women only up to 10 hours a day or 56 hours a week, with similar restrictions as to time, employees, and war purpose. Massachusetts, Maine, Louisiana, and Rhode Island enacted laws conferring upon the governors of those states general war powers broad enough to include the issuance of rules and regulations affecting labor conditions.[126] The Massachusetts statute definitely authorized the suspension of any law affecting the employment of persons when necessary to remove any delay or obstruction in the production or transportation of war materials. These statutes have been applied only in specific instances, upon a consideration of the war needs in each case.

A few more limited statutes on hours of work were also adopted in response to the war program. Kentucky suspended the observance of all holidays other than Independence Day, Labor Day, and Christmas for the duration of the war.[127] South Carolina authorized its Commissioner of Labor to permit Sunday work in machine shops[128] and Sunday employment of children and women on Government work in mercantile and manufacturing establishments.[129] Conscientious objectors were excepted and protected from discrimination. In New Jersey the governor was empowered to suspend or alter the law requiring a 30 minute mealtime whenever such action would not endanger health or production.[130] Mississippi memorialized Congress to suspend the 40-hour week provisions of the federal laws.[131] These statutes evidenced the general willingness of the state legislatures to do whatever appeared necessary to unburden war production of legal encumbrances. Their failure to enact more such legislation was probably due not only to the opposition of local organized labor and the state labor officials, but also to the fact that the War and Navy Departments did not request further legislation.

The federal war officials were generally content with the few changes in state labor laws because of their relaxation by executive or administrative action. Most of the restrictive state laws expressly permitted special exemptions for extra work during an emergency. Where such flexibility was lacking, the new laws supplied it or the state authorities proceeded under a general implied power of the governor to issue necessary regulations whenever the existence of the state is threatened. As a result, permits have been granted for overtime, night work, and Sunday work in war industries, regardless of the usual statutory limitations. Cases have been handled individually and the permits adapted to the actual need. Of approximately 1,448 applications filed in the first four months of the war, all but 129 were granted.[132] Those rejected revealed upon investigation the availability of other labor or the possibility of other operational adjustments. The situation has been followed closely

[126] Mass. Acts 1942, c. 13; R. I. Pub. Laws 1942, S. 25; Me. Laws 1942, c. 305; La. Acts 1942, Act No. 148.

[127] Ky. Acts 1942, S. 58.

[128] S. C. Acts 1942, Gov. No. 904.

[129] S. C. Acts 1942, Gov. No. 903.

[130] N. J. Laws 1942, c. 31. The mealtime was reduced from 45 minutes to 30 minutes and overtime was permitted from 8 hours to 10 at time and one half pay for women workers in Louisiana. La. Acts 1942, Act No. 183.

[131] Miss. Laws 1942, H. R. 38.

[132] *Hours, Overtime and All-Out Production* (April 1942) 5 LABOR STANDARDS 33-36.

by various federal agencies and the continued relaxation of the state hours laws to facilitate the war program has been assured in all states.

Labor Disputes. Most of the early efforts to enact labor laws aiding the war program were concerned with the elimination of strikes and other destructive practices, measures urged long before the declaration of national emergency. Maryland forbade sitdown strikes,[133] Texas outlawed violence in labor disputes,[134] and Georgia required notice and a waiting period before strikes or lockouts.[135] California prohibited strikes and boycotts against non-union goods.[136]

The major group of state laws on labor difficulties in defense production was the accumulation of anti-sabotage laws. There were 18 of them enacted in 1941 and 1942.[137] All but two[138] followed closely the model recommended by the Council of State Governments. They outlawed injury to or interference with property and defective workmanship with intent to hinder or interfere with the prosecution of the war. Mere attempts, conspiracies, and unlawful entry on property to the same ends were also prohibited. To placate organized labor, the laws contained a section preserving the right to organize, to bargain collectively, and to engage in other lawful concerted activities for mutual aid and protection. California, New Hampshire, and Wisconsin added that the statute was not to be construed to make strikes illegal.[139] Organized labor still opposed these laws and kept down their number.[140]

Recently Mississippi enacted a law making it a crime to use force or violence or threats to prevent anyone from engaging in any lawful vocation.[141] The management-labor agreement to arbitrate all disputes, however, made it possible for labor to withstand all other efforts to adopt such legislation.

Child Labor. The augmented demand for labor in the defense industries affected child labor regulation slightly although fear of an ultimate labor shortage caused many attacks upon existing laws. Such laws as were adopted, exempting newspaper carriers from the child labor law of Indiana,[142] relaxing night work standards for theatrical performances in California[143] and the District of Columbia,[144] and lowering the age limit for bowling alley pin boys in New Jersey,[145] may have reflected somewhat the curtailed labor supply due to defense activity.

[133] Md. Laws 1941, c. 340.
[134] Tex. Laws 1941, H. 800.
[135] Ga. Laws 1941, Gov. No. 293.
[136] Calif. Laws 1941, S. 877 (passed over veto).
[137] Ark. Acts 1941, Act No. 312; Calif. Laws 1941, c. 184; Colo. Laws 1941, c. 173; Fla. Laws 1941, c. 20252; Ky. Acts 1942, Sabotage Prevention Act; Me. Laws 1941, c. 237; Md. Laws 1941, c. 388; Mich. Pub. Acts 1941, Act No. 366; N. H. Laws 1941, c. 47; N. M. Laws 1941, c. 176; N. Y. Laws 1941, c. 868; Okla. Laws 1941, c. 52; Pa. Laws 1942, Act No. 13; S. C. Acts 1941, Act No. 148; Tenn. Pub. Acts 1941, c. 158; Utah Laws 1941, c. 31; Vt. Laws 1941, Act No. 188; Wis. Laws 1941, c. 106.
[138] The New York and South Carolina acts, *supra* note 137, were confined to the damaging of military or naval equipment, supplies or stores.
[139] Statutes cited in note 137, *supra.*
[140] The Governors of Texas and Oregon were induced to veto such bills.
[141] Miss. Laws 1942, S. 28.
[142] Ind. Acts 1941, c. 51.
[143] Calif. Laws 1941, c. 287.
[144] Pub. L. No. 380, 77th Cong., 1st Sess. (Dec. 26, 1941).
[145] N. J. Laws 1941, c. 139.

Most child labor laws, however, permitted the employment of enough young people to meet immediate needs and the defense program had its chief effect in discouraging the elevation of child labor standards rather than in destroying existing standards.

The war changed this situation very little. The outstanding field of employment in which there was a demand for child labor and some resultant legislation was agriculture. The war industries drew away the mobile labor groups and the war wage levels made it extremely difficult for farmers to obtain labor at customary rates. Accordingly, New York enacted a law permitting children 14 and over to leave school to work on farms for 30 days in the school year[146] and another law allowing the issuance of work permits without the usual requirement of a promise of employment;[147] California provided that schools closed for agricultural work may continue to receive state financial aid;[148] and New Jersey established a State Commission on Student Service to regulate the release of children 14 years of age and over from school for agricultural work and to provide for the transportation and housing of those sent away from home.[149] The New Jersey law also permits a week's work of six 8-hour days or five 10-hour days and requires wages comparable to those paid adults. These relaxations are probably all the more significant because a wide latitude is generally provided for employment of children in agriculture.

To avoid a widespread abandonment of child labor standards and to minimize the abuses of existing lax laws, the Children's Bureau of the United States Department of Labor, together with the Department of Agriculture, the United States Office of Education, and the United States Employment Service, issued a policy statement on the employment of children in agriculture.[150] It recommended that young persons 16 years of age be employed before children of 14 and 15, that school sessions be dovetailed with agricultural work, and that children of 14 and 15 be released from school only if farm labor could be supplied in no other practicable way. Such a program called for more than the child labor standards of many agricultural states.

In a few miscellaneous statutes, child labor was affected favorably as well as adversely. School reporting was improved in Virginia;[151] lunch periods were required in Maine;[152] and child employment under 18 was prohibited in the penal institutions of New York.[153] Louisiana and Puerto Rico raised their minimum age from 14 to 16 in most occupations, reduced the maximum hours of work for children, and improved their enforcement provisions.[153a] In relaxing their hours laws for war work, New York,[154] Louisiana,[154a] and Virginia[155] expressly preserved existing

[146] N. Y. Laws 1942, c. 233.
[147] *Id.* c. 692.
[148] Calif. Laws 1942, c. 22.
[149] N. J. Laws 1942, c. 23.
[150] *Policies on Recruitment of Young Workers for Wartime Agriculture*, U. S. DEP'T OF LABOR, CHILDREN'S BUREAU (March 1942).
[151] Va. Acts 1942, c. 43.
[152] Me. Laws 1942, c. 324.
[153] N. Y. Laws 1942, c. 828.
[153a] La. Acts 1942, Act No. 341 (July 17, 1942); Puerto Rico Acts 1942, Act No. 230 (May 12, 1942).
[154] *Id.* c. 544.
[154a] La. Acts 1942, Act No. 41 (July 5, 1942).
[155] Va. Acts 1942, c. 105.

standards for minors under 18. On the other hand, Virginia opened theatrical performances to children[156] and New York reduced the minimum age for the operation of pleasure vessels from 16 to 12.[157] The war need for labor has apparently caused the enactment of only a few laws releasing children for gainful employment.

Safety and Health. The development of a safety program for war industries has been much more a federal activity than a state. The state laws have not been amended,[157a] nor has there been a noticeable increase in appropriations to care for the augmented work load. Several states attempted to concentrate their limited inspection staffs upon war plants, and in Pennsylvania, Ohio, and Wisconsin cooperative arrangements were made with the federal authorities to use state inspectors for plant visitations under the Federal Public Contracts Act. Most of the state activities in the field of safety and health, however, have been unaffected by the war.

A notable exception to the even pace of state health activity occurred in the adoption of a compulsory health insurance law in Rhode Island,[158] the first of its kind in the country. The law failed to provide for medical care, but it compensated workers unemployed because of illness. Although not strictly a war measure, it opened a new approach to social security in a fertile field with many war implications.

Unemployment Compensation. In contrast to the inaction of the Federal Government in the field of old-age insurance, the states took positive steps to adjust their unemployment compensation acts to war conditions. Since the unemployment benefit payments depend upon the continuation of contributions in covered employment and the average earnings of the employee during a period prior to his unemployment, it is essential to avoid a lapse of time for which no credit is allowed. Time spent in the armed service, in the absence of special provision, is not time spent in covered employment. To meet this situation 41 states have amended their laws. One group eliminated the period of military service from the base period used to compute earnings and benefits;[159] a second group froze benefit rights as of entry into service;[160] and a third group granted the service men wage credits for each quarter of service.[161]

Other amendments to the state unemployment compensation acts improved benefit schemes and extended coverage. The changes in 1940 and 1941 followed some of the 1939 amendments to the Federal Social Security Act and repaired some of the deficiencies of the early state acts.[162] Nearly all of the states also made provision to pay compensation to persons remaining unemployed after discharge from

[156] *Id.* c. 167.

[157] N. Y. Laws 1942, c. 546.

[157a] Louisiana adopted new boiler inspection laws. La. Acts 1942, Acts Nos. 204, 205 (July 11, 1942).

[158] R. I. Pub. Laws 1942, c. 1200.

[159] Thirty states have adopted this means: Ariz., Ark., Calif., Colo., Conn., Del., Hawaii, Ind., Iowa, Kan., Me., Md., Mass., Mich., Minn., Mo., Mont., Nebr., Nev., N. H., N. Y., N. C., N. D., Ohio, Okla., Ore., R. I., S. D., Vt. and Wis.

[160] Four states—Fla., Ga., S. C., and Tenn.—have adopted this means.

[161] Three states—Utah, Ill. and Wis.—have adopted this means.

[162] *Unemployment Compensation Legislation of 1941* (March 1942) 5 SOCIAL SECURITY BULL. 14-20.

the armed forces.[163] In 1942, however, once the federal efforts to obtain war displacement benefits failed, only the state of Michigan felt impelled to provide them.[164] New York enacted a law which gave transportation and temporary home relief to persons offered a job in New York or in a bordering state, and it disqualified for relief persons refusing vocational training for defense work.[165] Other states merely increased the benefits under their existing laws.[166] On the whole, however, the states have been much more responsive to the war situation in social security legislation than has the Federal Government.

General War Powers Acts. The uncertainty of war needs and the desirability of complete preparedness led many persons to advocate general enabling acts authorizing state governors or state defense councils to do anything necessary for the successful prosecution of the war.[167] In 1942 the states of Massachusetts,[168] Maine,[169] and Rhode Island[170] enacted comprehensive war powers acts. Although they refer primarily to the utilization of material resources and the protection of life and property, they contain general authorizations which may be applied to the use of manpower and the determination of labor standards in critical situations. Other more specific statutes with labor implications were those permitting the organization of State Guards.[171]

The exercise of such powers and their effect upon labor standards may be extensive or negligible, depending upon the developments of the war. So far there has been little occasion for resort to those powers. As long as the Federal Government continues to control the war program as it has, it is likely that such general state laws will remain mere potentialities.

IN CONCLUSION

The European war cast its influence over this country and our laws affecting labor in a gradual, though persistent manner. Much that occurred at the close of 1939 and through 1940 was a continuation of earlier trends and an effort to withstand the irresistible drift toward war. The emergence of the defense program was slow and painstaking, and the adaptations of labor law followed a similarly tortuous course. Our engulfment into the war quickened our industrial activity and led to more deliberate adjustments in labor law. But the fundamental character of our labor law was not rearranged. It appears certain that the process is still unfolding and that significant changes may yet come. Nevertheless in the two years of defense

[163] Forty-three states enacted such laws. See Prentice-Hall, Unemployment Ins. Serv.

[164] Mich. Pub. Acts 1942, 2d Extra Sess., Act No. 18 (terminates May 31, 1943).

[165] N. Y. Laws 1942, c. 925. [166] N. Y., Pa. and R. I.

[167] All forty-eight states organized State Defense Councils under the direction of the Governors to be prepared for emergency action.

[168] Mass. Acts 1942, c. 13.

[169] Me. Laws 1942, c. 305. [170] R. I. Pub. Laws 1942 (S. 25).

[171] The following 27 states passed a State Guard Act similar to one formulated by the Federal-State Conference on Law Enforcement Problems of National Defense: Colo., Del., Fla., Ind., Iowa, Kan., Me., Md., Neb., N. M., N. Y., N. C., N. D., Ohio, Okla., Ore., Pa., R. I., S. C., S. D., Tenn., Texas, Utah, Vt., W. Va., Wis., and Wyo.

activity and nine months of war certain definite influences have been manifested which are worthy of note.

The war has not rewritten any of the major pieces of labor legislation. Insofar as it has called for new legislation, it has expressed itself essentially through new statutes. The principal federal laws were either completely untouched or amended in insignificant details. The Federal Eight Hour Law and some of the state hour laws were amended more fundamentally. Additions were made to state unemployment compensation acts and the railroad pension and unemployment acts to refer expressly to war situations. Primarily, however, the war labor legislation has taken the form of isolated provisions within the Defense Acts, the Selective Training and Service Act, the Soldiers and Sailors Civil Relief Act, the War Powers Acts, and various appropriation acts.

Nor have the courts altered their decisions in response to the war. In the period of our defense and war programs, the United States Supreme Court rendered many far-reaching opinions, yet very few have shown the impact of the war.[172] The Court held federal wage and hour legislation constitutional and reversed its former ruling on the validity of federal child labor regulation;[173] it interpreted the language of the NLRA broadly to require the writing and signing of an agreement reached by collective bargaining;[174] it excluded from the application of the Sherman Act jurisdictional disputes and boycotts that did not seek the control of prices or commercial practices;[175] and it reversed itself on the power of state legislatures to control the fees of private employment agencies.[176]

In none of these significant labor decisions was the war an influential factor. The oppression of the Axis powers, however, may have helped elicit from the Court the impassioned defense of freedom of speech, press, and assemblage in its decisions denouncing laws prohibiting the distribution of handbills,[177] or peaceful picketing,[178] or in its decision upholding the right of a labor leader to suggest a strike

[172] It is obviously impossible to ascertain the full extent to which the Court may have been affected by the war. In a recent case counsel for an employer argued that because of the war emergency, the Fair Labor Standards Act should not be interpreted in a way that would penalize overtime work. The Court sustained the interpretation sought by counsel, but there is no indication that it did so because of that argument. Walling v. A. H. Belo Corp., 62 Sup. Ct. 1223 (1942).

[173] U. S. v. Darby Lumber Co., 312 U. S. 100 (1941).

[174] H. J. Heinz Co. v. NLRB, 311 U. S. 514 (1940).

[175] Apex Hosiery Co. v. Leoder, 310 U. S. 469 (1940); U. S. v. Hutcheson, 312 U. S. 219 (1941); U. S. v. Int. Hod Carriers & Common Laborers Union; U. S. v. Building & Constr. Trades Council; and U. S. v. United Bro. of Carpenters and Joiners, 37 F. Supp. 191 (N. D. Ill. 1941), *aff'd*, 313 U. S. 539 (1941).

[176] Olsen v. Nebraska, 313 U. S. 236 (1941).

[177] Lovell v. City of Griffin, 303 U. S. 444 (1937); Hague v. CIO, 307 U. S. 496 (1938); Schneider v. Irvington, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940); Cox v. New Hampshire, 312 U. S. 569 (1941).

[178] Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); Milk Wagon Drivers' Union v. Lake Valley Farms, 311 U. S. 91 (1941); Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287 (1941); AFL v. Swing, 312 U. S. 321 (1941); Hotel etc. Employees Int. Alliance v. Wisconsin Employment Rel. Board, 62 Sup. Ct. 706 (1942); Carpenters etc. Union v. Ritter, 62 Sup. Ct. 807 (1942); Bakers etc. Helpers Local v. Wohl, 62 Sup. Ct. 816 (1942); Allen-Bradley Local No. 1111 v. Wis. Employment Rel. Board, 62 Sup. Ct. 820 (1942).

against a proposed court order.[179] The Court also seemed to refer to current dangers in its holding that strikes on board ships, even in home ports, were unlawful.[180] Aside from these few instances, it is not clear that the war was responsible for the substance or tenor of the Supreme Court opinions in labor cases.

As far as the legislative and judicial records are concerned, it appears that the war has not altered the basic principles of American labor law. Employees have the right to organize and to select their representatives free from the influence of their employer. Collective bargaining is required. The right to strike, though denied seamen and though voluntarily abandoned by most workers for the duration of the war, remains otherwise intact. Picketing is protected by constitutional guarantees, and boycotts are generally removed from the Sherman Act. Wages, hours, and working conditions are matters of private contract, subject to the minimum standards enacted to protect the weak from the strong in the industrial market. Social security remains as collective insurance against certain risks of our economic order. So the fabric of our labor law has weathered the onset of war without serious distortion.

The great changes wrought by the war in labor law have been produced not through legislation or court decisions, but through the orders and activities of the executive officers of our Government. The federal officials who developed the labor training and placement programs, who mediated and arbitrated labor disputes and stimulated the adoption of stabilization agreements have been making the real war changes in labor law. So on the state level, the administrative officials who granted exemptions from hours laws, night work laws, and Sunday laws to meet war needs have controlled the extent to which the war has relaxed labor standards. All of the officials have been united in a desire to contribute to the war effort, yet most have been aware of the long struggle required to obtain labor laws and of the possibilities of abuse in a complete abandonment of any of the laws. So, wherever necessary, existing standards have been relaxed, but care has been exercised to preserve a basis for post-war recoupment and progress.

Between the present and the aftermath of the war lies an unexplored sea. The many attempts to scuttle our labor laws have been resisted, yet their revival is still possible. The few attempts to advance labor standards within the war program have not proceeded far, yet they too may be revived. Probably through executive action more than through legislation may we expect important developments. The War Manpower Commission has the power to rearrange our labor market and the War Labor Board may set the pattern for fundamental changes in our terms of employment. There is still the hope of expansion in our social security program. The only certainty seems to be that whatever adjustments will be deemed necessary for success in the war will be made.

[179] Bridges v. California, 314 U. S. 252 (1941).
[180] Southern Steamship Co. v. NLRB, 62 Sup. Ct. 886 (1942).

THE WORK OF LABOR BOARDS AND AGENCIES IN WARTIME

CARL R. SCHEDLER*

The description in this article of the activities arising out of the war effort of the governmental agencies which deal with industrial disputes and economic problems must of necessity be factual and uncolored by psychological points of view or personal reference. The subject is complex and little understood. To attempt to simplify the treatment or create an apparent logic for the development would be a distortion of facts. I present a candid snapshot of the agencies administering these activities with no attempt to make them seem picturesque or unique.

With the exception of the United States Conciliation Service, the National Labor Relations Board, the National Mediation Board, and the National Railroad Adjustment Board, all the agencies presented have grown up in the atmosphere of wartime emergency. Although new in point of time, they are very largely traditional in their developments and procedures. What they lack in color is compensated to a considerable degree by the significance of their work. Their future is unpredictable but I dare say the nature of the business they conduct is of lasting importance to the nation. This may give them a lease on life beyond the duration of the war.

The United States Conciliation Service

The job of settling labor-management disputes in our present war effort is not a new function of the United States Conciliation Service. Since 1913 it has been continuously settling all types of labor-management disputes in almost all industries throughout the country and outlying possessions. The present war, of course, presents many new problems. To meet these and to aid continuous and increased production, various new programs and policies have been adopted.

In the President's Executive Order of January 12, 1942,[1] the Conciliation Service was named the first-line agency for handling labor-management disputes affecting the war production effort. Although this order did not set forth new functions for the Service, it was especially significant because only a month before labor and management had promised to settle all grievances through existing mediation and arbitration machinery.

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[1] 7 FED REG. 237.

The first and most noticeable reaction to the Executive Order was an increase of cases brought to the attention of the Service at an early stage of the dispute. A year before, the Service was carrying an active case load of about 600 cases. Five months after the new emphasis on mediation and conciliation, the Service had over 1600 active cases. Of these 1600 cases, a very small percentage involved strikes affecting the war effort. In fact, the reports from day to day over a period of months show that less than 7 hundredths of one percent of the cases were strikes which hindered the war production program.

From the beginning of the defense program, the Service had placed primary emphasis on all cases affecting production. With the declaration of war and a growing case load, it became increasingly necessary to give priority, and in some instances special treatment, to all cases which affected the production and transportation of materials vital to the war effort.

The special treatment of cases affecting the war effort has largely consisted of an increased use of voluntary arbitration, conciliation by panels of Commissioners, and the certification of cases to the National War Labor Board. These methods, in addition to regular conciliation procedures, have enabled the Service to settle all but a limited number of cases. In fact, for the first eight months of 1942, the Service settled almost six thousand cases while it was necessary to certify only 436 cases to the War Labor Board for further action.[2]

The National Labor Relations Board

The National Labor Relations Board[3] has been operating continuously and successfully for six years. Its jurisdiction has been upheld by the Supreme Court. Its procedure has been approved, and the Board is now a well-established agency. Although it has been given no new duties in our present war effort, the Board has a primary function in administering the Act which insures the right of workers to bargain collectively.

Recent reports from the Board show that four out of five workers in Board cases are employed in war industries; the incoming case load of the Board exceeds one thousand cases a month; and the Board gives priority to all cases affecting the war effort. There is also evidence of an increased desire of workers to determine for themselves their bargaining representatives. This has shifted the normal predominance of cases before the Board from cases containing charges of unfair labor practices by employers to cases of petitions for employee elections.

The National Mediation Board

The National Mediation Board was created in 1934[4] to govern the labor relations of interstate railroads and airlines and their employees. It has power to mediate all

[2] For a more extended description of the work of the Service, see Steelman, *The Work of the United States Conciliation Service in War Time Labor Disputes, infra,* p. 462. ED.

[3] Established by the National Labor Relations Act of July 5, 1935, 49 STAT. 451, 29 U. S. C. §153.

[4] Act of June 21, 1934, 48 STAT. 1193, 45 U. S. C. §154.

disputes concerning the establishment of, or change in, the agreements covering rates of pay, rules, and working conditions in these industries after direct negotiation of the parties has been attempted. A party wishing to make a change in an agreement must give 30 days' written notice to the other party and, within 10 days of its receipt, the time and place for joint conference must be arranged. If agreement is not reached, either or both parties may request the assistance of the National Mediation Board or the Board may intervene of its own accord. The Board's sole function, however, is one of conciliation. If the case is not settled by mediation and a strike vote is taken, the Board may notify the President who then appoints a fact-finding body. The findings of this body are enforced only by public opinion.

Now that labor and management have pledged "no strikes or lockouts" for the duration, it would be contrary to the effective prosecution of the war for a strike vote to be taken. In order that investigations of cases can be made without a strike vote, the President on May 22, 1942, created the National Railway Labor Panel[5] to which the National Mediation Board can certify cases for investigation and report to the President. This executive order is of vital importance to the war effort as the Board has been dealing almost wholly with cases affecting war transportation.

The National Railway Labor Panel

The National Railway Labor Panel created by the Executive Order of May 22, 1942,[6] was authorized to handle railway labor disputes which are not adjusted by the National Mediation Board. The Board notifies the Chairman of the Panel concerning the unsettled dispute and, if he decides that it may interfere with the prosecution of the war, he will select three members from the panel of nine to serve as an emergency board to investigate the dispute and report to the President. This board has final jurisdiction over the dispute and will make every effort to settle it.

The National Railroad Adjustment Board

The National Railroad Adjustment Board was established under the Railway Labor Act of 1934[7] for the adjudication of disputes involving the interpretation or application of agreements covering pay, rules, and working conditions on the railroads. The Board consisting of thirty-six members, eighteen selected by the carriers and eighteen selected by organizations of railroad employees, is similar to an arbitration tribunal. It hands down decisions which are binding upon both parties. A comparable board for airlines, the National Air Transportation Adjustment Board,[8] may be set up by the National Mediation Board when circumstances require.

The National Defense Mediation Board

The National Defense Mediation Board was created by the Presidential Executive Order of March 19, 1941,[9] and operated until abolished on January 12, 1942 by the

[5] Exec. Order No. 9172, 7 FED. REG. 3912. [6] *Ibid.*
[7] Act of June 21, 1934, 48 STAT. 1189, 45 U. S. C. §153.
[8] Act of April 10, 1936, 49 STAT. 1190, 45 U. S. C. §185.
[9] Exec. Order No. 8716, 6 FED. REG. 1532.

Executive Order creating the National War Labor Board. The former board was composed of eleven members appointed by the President: three representing the public; four representing the employees; and four representing the employers. The Order was later amended to provide for alternates.[10]

The Board was authorized to act "whenever the Secretary of Labor certifies to the Board that any controversy or dispute has arisen between any employer and any employees" which threatens to obstruct production or transportation essential to national defense and which has not been adjusted by the Conciliation Service. To facilitate certification, the Secretary of Labor designated a three-man committee to advise as to the most effective time for certification. This committee was composed of the Chairman of the National Defense Mediation Board, a representative of the OPM, and the Director of the Conciliation Service.

Upon certification of a case by the Secretary of Labor, the Board was authorized to continue negotiation, afford means of voluntary arbitration, conduct investigations, hold hearings, take testimony, make public findings of fact and make formal recommendations. Under the terms of the Executive Order, controversies certified to the Board were to be handled by a panel of three Board members, or alternates, with labor-management and the public represented on each panel.

The establishment of this Board in no way implied compulsion. The Board asked the parties to do specified things and made formal recommendations. The expectation was that these recommendations would be accepted because the Board had the support of the President and the public.

During the ten months of the Board's existence, many controversial issues arose. Of these, union status was the most difficult issue, according to a statement by the Chairman of the Board. In fact, the Board has stated that it was the recommendation of a maintenance-of-membership clause in the *Kearny Shipyard* case, and the refusal to grant a union shop in the captive coal mine dispute which ended the influence of the Board. During its life 114 cases were certified to the Board. Twenty-three of these were turned over to the National War Labor Board upon its establishment.

National War Labor Board

The President issued the Executive Order of January 12, 1942[11] to establish a definite policy for the settlement of labor-management disputes as well as to provide further mediation machinery. As has been pointed out, this Order created the National War Labor Board to replace the National Defense Mediation Board. It set forth three steps for adjusting and settling labor-management disputes "which might interrupt work which contributes to the effective prosecution of the war": first, direct negotiations by the parties involved; second, conciliation by the United States Conciliation Service; third, mediation or arbitration by the National War Labor Board.

The Board is composed of twelve members, four each to represent the public, the employers, and the employees. The Order also provided for alternates and for a Chairman and Vice-Chairman chosen by the President.

[10] *Id.* at 1809.

[11] Exec. Order No. 9017, 7 FED. REG. 237.

The Board is authorized to act when the Secretary of Labor certifies a dispute "which might interrupt work which contributes to the effective prosecution of the war" and which has not been promptly settled by the Conciliation Service. The Executive Order also states that "the Board at its own discretion after consultation with the Secretary may take jurisdiction of a dispute on its own motion." This it has done only once. Its practice is to handle only cases certified after settlement has been attempted by the Conciliation Service.

When the Board enters the case it is authorized, as was its predecessor, to continue negotiations, afford means of voluntary arbitration, conduct investigations, hold hearings, take testimony, make public findings of fact, and make formal recommendations.

The Board's first action on a new case is usually to assign it to mediation.[12] The mediator assigned attempts to settle the case or to narrow the issues. The next step is to have the parties appear before a mediation panel of the Board, composed of one representative of the public, one of management, and one of labor. If the issues in a case are not resolved by mediation, voluntary arbitration is then suggested. If either party refuses arbitration, the dispute comes before the twelve-man War Labor Board for a final decision. The mediation panel draws up its recommendations for settlement and is unanimous in its conclusions. In practically every case, the Board has adopted the panel recommendations, but, in case of disagreement or desire for further information, the Board holds a public hearing and the parties present arguments for and against the panel recommendation. The Board determination is final and there is no appeal from the Board's order.

From its inception, the Board has faced two main issues: union security and wages.[13] At the President's labor-industry conference, out of which the Board grew, union security was the one acute difference. The industry members of the conference were opposed to having cases involving this issue settled by a Board created by the President. The Board's power, however, was not limited and soon after its creation it passed the following resolution:[14]

> This Board has authority to consider all labor disputes which might interrupt work which contributes to the effective prosecution of the war, including labor disputes as to union status.

From the establishment of the Board on January 12, until September 1, a total of 460 cases came before the Board. Twenty-three of these were cases carried over from the National Defense Mediation Board while the other 437 were new cases. Of these, 205 were disposed of by September 1; 66 through mediation, 16 with voluntary arbitration, and 100 by Board decisions, and 21 through other dispositions.

The Board has given several evidences that it intends to have its recommendations

[12] A more detailed discussion of the Board's procedure is presented in the last article in this symposium. ED.

[13] For a discussion of the Board's rulings on these issues, see Rice, *The Law of the National War Labor Board, infra*, p. 470. ED.

[14] Resolutions of March 18, 1942, 10 LAB. REL. REP. 113.

accepted and that it knows how this can be done. One such example was a recent case in which the Board conducted a public hearing for the purpose of receiving testimony on a company's declaration that it would not comply with a Board order. At the hearing, the Board stated that compliance with its orders was expected as a patriotic duty and that defiance of such orders was tantamount to defiance of the President of the United States. The company complied with the order.[15]

Building Trades Stabilization Board of Review

When in July, 1941, representatives of the Building and Construction Trades Department of the AFL and representatives of certain governmental agencies engaged in defense construction met together under the auspices of OPM, they voluntarily entered into an agreement[16] to stabilize certain working conditions. The agreement applied only to defense construction. It established uniform overtime rates and uniform shifts; pledged continuous production; created a Board of Review; contained specific provisions relating to sub-contractors and apprentices; and provided for predetermination of wages and for the application of the agreement.

The Board of Review, consisting of representatives of government agencies and of the AFL Building and Construction Trades Department, is empowered to interpret the agreement under which it operates and adjusts the disputes arising under it. In case a dispute involves a specific governmental agency, that agency may designate a representative as a temporary member of the Board for the mediation of that dispute.

The stabilization agreement provided that: "The Board shall have no authority to encroach upon or to relieve any Governmental agency of its legal authorities or responsibilities." Other governmental agencies, therefore, continued to aid in maintaining harmonious labor-management relations in the building trades field.

The Board, according to its own statement, was not intended to provide a forum for hearing and determining all disputes growing out of the stabilization agreement between employers and employees in defense construction, but rather to function as a court of last resort for the adjudication of disputes after all other efforts on the part of the union and the governmental agency involved have been exhausted. The Board also reserves the right to decline to sit in judgment on any dispute which, in its opinion, is not related to the stabilization agreement or which involves parties not bound by the terms of the agreement.

Recently[17] the Board ruled that it had no authority to designate collective bargaining agencies since the stabilization agreement does not provide for the union shop or other aspects of employee representation. The Board also determined that the agreement applies to contractors doing work for state housing authorities by reason of the fact that the Federal Housing Authority is a party to the agreement and finances in large part the state housing authorities.

When disputes are accepted by the Board for adjustment, the parties to the dispute must file a joint submission stating the issues involved. They must then file with the

[15] As to Presidential action in case of non-compliance see Rice, *supra* note 13, at 488, 489. ED.
[16] (1941) 8 LAB. REL. REP. 764.
[17] See (1942) 10 LAB. REL. REP. 191.

Board and with other disputants a statement of claims containing all the facts tending to support the contention of the disputant presenting the statement. At the hearings, there can be only one spokesman for each side and oral arguments are permitted only on points contained in the written statement. The decision of the Board in writing is final and binding.

Building Trades Wage Adjustment Board

The Building Trades Unions of the AFL and the various contracting agencies of the Government voluntarily agreed on May 22, 1942,[18] to stabilize wages for the duration of the war. Those governmental agencies signing the agreement were the War and Navy Departments, Federal Works Administration, National Housing Administration, Reconstruction Finance Corporation, and the Maritime Commission.

The agreement provides for the inclusion of all war construction work, in the continental United States, which is done for or financed by the Government except non-federal construction where state laws govern wage rates. Arrangement was made for the stabilization of wages on July 1, 1942. This provision will be subject to revision only in cases where rates are inadequate because of some abnormal change in conditions or where rates were set at a time so long before July 1, 1942, as to be out of line with the general prevailing wages. The agreement also provided for a Wage Adjustment Board to determine when adjustments should be made and the amount of the adjustment.

The Wage Adjustment Board is set up in the Department of Labor and consists of a chairman to be appointed from the Department, three representatives of the contracting agencies of the Government, and three representatives of labor from the building construction industry.

The Board has power to make the necessary rules of procedure, to investigate, and to recommend adjustments of wage rates under the provisions of the agreement. It may also request the Solicitor of the Department of Labor to conduct investigations, hold hearings, and make reports to the Board on the prevailing rate of wages for any or all classes of laborers and mechanics in the building construction industry in any locality; or the relation of such wage rates to those generally prevailing in the industry, trade or locality; or on the relation of such wages to the cost of living.

Requests for wage adjustments are considered by the Board if they are presented by local labor organizations with the approval of the national or international labor organization and with the approval of the Building Trades Department of the AFL.

The Ship Stabilization Committee

The number of ships needed to carry out the defense and war programs made it necessary to produce ships of all varieties more rapidly and in far greater numbers than had previously been conceived. Cargo ships and battleships were needed as

[18] See (1942) 10 LAB. REL. REP. 442.

were tankers, tugs, barges, airplane carriers, transports, torpedo boats, and many other varieties.

To meet the goals of unprecedented proportions it was necessary for labor and management, as well as the Government as buyer, to solve jointly and in a voluntary way some of the common problems to be faced on the Atlantic and Pacific Coasts, the Gulf and Great Lakes. To meet this need, the Ship Stabilization Committee was established on November 27, 1940.[19] This Committee consists of two representatives from the AFL, two from the CIO, three from management, and three from the Government. The latter includes the Chairman who is a representative of the WPB (originally of the National Defense Advisory Commission) and one representative each from the Navy Department and the Maritime Commission.

The function of this committee, as stated by the Defense Advisory Committee of the former National Defense Commission under which the Committee originally operated, is to develop a labor program which will insure the most efficient and speedy construction of ships. The Committee is also instructed to make a detailed investigation of wage rates and working conditions with particular reference to the migration of workers from yard to yard and the effect upon production.

Soon after the Committee was formed, it adopted a policy resolution which has aided continuous production and harmonious labor-management relations in the industry.

> The Ship Stabilization Committee . . . adopts a policy urging that there should be no interruption of production on the part of shipyard employers and of shipyard employees before all facilities at the disposal of the National Defense Advisory Commission for adjusting differences have been exhausted.

The Committee was soon able to list the issues which would undoubtedly arise in attempting to stabilize the industry and to formulate policy to meet these issues. It was decided that a standard basic hourly rate for skilled mechanics would be arrived at through voluntary negotiations and would be subject to periodic review. The definitions of occupations and rates for other types of work would be worked out in local collective bargaining negotiations because of the variety of local situations. It was determined that overtime which would protect labor standards and yet not hinder any necessary lengthening of the work week would be a matter for consideration. Sufficient grievance machinery to meet all problems, with provision for arbitration when necessary, would be considered. After these points were determined, the Committee decided it would then attempt to agree to a program of no strikes or lockouts during the emergency. Many other problems such as shift premiums and training of workers were also discussed and broad policy formed.

The Committee then set about to bring stabilization to the industry through the voluntary cooperation of the parties of the four areas or zones—the Atlantic and the Pacific Coasts, the Gulf, and Great Lakes. The first of the conferences to establish

[19] (1940) 7 LAB. REL. REP. 371.

zone standards was the Pacific conference which met in February, 1941.[20] This was followed in the next few months by the Atlantic, Great Lakes, and Gulf conferences. Through a gradual and voluntary process of negotiation, with representatives of labor, management, and the Government participating and with the Government actually party to the agreement, satisfactory zone standards were reached.

As the conferences progressed, variations to the established policies were developed. On the Pacific Coast three agreements were formed:[21] the Zone Standards Agreement covering wages, shifts, overtime, and the settlement of grievances in ship construction only; the Repair and Conversion Agreement; and the Master Agreement covering further working conditions. In the conferences in the other three areas, only one agreement was entered into to cover each area. These agreements[22] covered ship repair as well as construction. They also provided for more details as it was found easier to translate such a program into local agreements. Originally it had been decided that the labor organization which had the majority of workers under agreement in each zone was to represent labor—with the minority conforming to the approved standards. So many gradual changes had been made as the various conferences progressed, that when the fourth conference, the Gulf States conference, was held, both labor organizations were actively represented.

All four agreements provided the following: a basic hourly wage for skilled mechanics ($1.13 in three conferences and $1.07 in the Gulf); time and a half over 8 hours a day and 40 hours per week; double time for Sundays and holidays; premiums for the second and third shifts; settlement of grievances through negotiation, conciliation, and arbitration; and no strikes or lockouts for the duration.

In Chicago on April 27, 1942, a year after the first stabilization agreements were ratified, a national conference of management, labor, and government representatives concerned with the shipbuilding industry was held under the auspices of the Shipbuilding Stabilization Committee.[23] This conference was called to adjust and stabilize wages in view of the increased cost of living and to take into consideration a number of other important matters.

The President by telegram on May 4 urged the conference to stabilize wages so that the "wage standards of the workers in the shipbuilding industry and in other industries, and the living standards of all persons of modest income, may be preserved against the inflationary rise in the cost of living." These words played an outstanding part in the amendments adopted by the conference on May 16.[24] Wage differentials were abolished as a standard wage rate of $1.20 for skilled mechanics was set for all four zones. At the same time, the wage rates of all other employees increased by eight cents an hour except in the Gulf where the increase was slightly more in an attempt to standardize the whole industry. Overtime, holiday, and vaca-

[20] The Conference is reported in (1941) 7 LAB. REL. REP. 600.
[21] *Ibid.*
[22] For reports of these agreements, see (1941) 8 *id.* 585, 732.
[23] See (1942) 10 LAB. REL. REP. 423.
[24] For full text, see *ibid.*

tion provisions were modified. It was determined that any disputed point in the interpretation and application of the agreements or amendments should be referred to the Shipbuilding Stabilization Committee. It was also decided that the provisions decided upon should apply to the construction of new vessels and that separate zone conferences should decide upon the conditions to apply to repair and conversion.

Shortly following the Chicago conference, a conference[25] on the Pacific Coast made an important change in the conditions applying to repair and conversion. It was determined that conversion work should be deemed construction work when on a "new vessel," a term applying to any newly constructed vessel prior to its completion, final acceptance, or actual employment in the service for which it has been constructed.

The stabilization agreement has now been in effect one year. It has covered an industry stretching up and down both coasts, on the Great Lakes and in the Gulf. It has included all types of plants with every variety of employee organization. And during the entire time there has been only one major dispute and that involved an internal union situation. This record gives evidence that the agreement was flexible enough to provide for the necessary settlement of disputes, the adjustment of rates, and inclusion of the desires of both labor organizations.

Because we have had stabilization, coordination, and cooperation of Government, labor, and management there have been harmonious labor-management relations which have made it possible for ships of all varieties to roll down the ways months ahead of schedule.

Maritime War Emergency Board

The Maritime War Emergency Board evolved as an outgrowth of the joint conference of labor and management representatives of the maritime industry. The President appointed the three-man Board on December 19, 1941,[26] to aid in expediting and coordinating the industry's war effort.

The unions, representing the personnel of the vessels of the American merchant marine, and the operators of those vessels had pledged all-out and uninterrupted cooperation with the war effort. To meet this goal, it was necessary for all questions arising to be settled promptly and satisfactorily. Under normal conditions this would have been possible through regular collective bargaining procedure. However, because of war conditions, neither labor nor management was in a position to obtain information concerning the extent of war risks sufficient to enable them to bargain intelligently on questions relating to war risk compensation and insurance of personnel. The Board, therefore, was established to afford additional procedure for settling these questions on the basis of adequate and accurate government information.

Any question relating to war risk compensation or personnel insurance, not settled through ordinary channels, can be referred to the Board by either party upon

[25] For full text, see *id.* 503, 508.

[26] See (1941) 9 LAB. REL. REP. 463.

written notice to the Board and to the other party involved. After notice, the Board hears the evidence of both sides and then renders a decision in writing. All decisions are final and binding.

In attempting to meet the aims set for it by the joint labor-management maritime conference, the Board established insurance for all personnel of American merchant marine vessels; defined danger zones; set bonus rates for danger zones; made bonus rates retroactive to December 7; froze contracts; and provided for loss or damage to personal effects.[27] It provided procedure for the settlement of disputes arising from new issues. In May, 1942, the Board was working on the new problems of insurance to be paid dependents of seamen lost in the period December 7-22, and "creative insurance" to cover seamen lost through indirect war action. The Board has also provided for the settlement of disputes over the interpretation of its decisions.

Labor Production Division of the War Production Board

The Labor Production Division of the WPB, formerly the Labor Division of the OPM, was established as early as May, 1940, when it was formed as a part of the National Advisory Defense Committee to aid the uninterrupted production of defense materials. It became an operating unit of the Office of Production Management on March 18, 1941. When the War Production Board was formed on January 16, 1942, it then became a part of that Board. And in April, 1942, the Labor Division became the Labor Production Division.

The Labor Division operated through various branches: labor morale, labor standards affecting the war effort, labor relations, and labor supply and training. When the War Manpower Commission was established by Executive Order, on April 18, 1942,[28] however, the labor supply activities of the Division were taken over by the War Manpower Commission and the labor training activities by the Federal Security Agency.

The Labor Supply Branch was established to coordinate activities for recruiting, training, and maintaining qualified workers in industries vital to the defense and war effort. The Training-Within-Industry Branch was formed to advise and assist war industries in establishing programs of upgrading, apprenticeship, foreman training and on-the-job training. And these methods have been installed in over 3,000 war contracting concerns. The Defense Training Branch was set up to stimulate training programs conducted outside of the industry. The Labor Relations Branch was formed with a group of labor and management consultants who sought to spot labor problems and to aid in establishing harmonious labor-management relations. The Priorities Branch was created in an effort to check serious dislocations of labor due to shortages of materials and supplies. The Defense Housing Branch was established to survey the housing needs of localities handling war orders, and the Negro Employment and Training Branch sought to train and integrate Negro workers with the war industries.

[27] For reports on the Board's activities, see *id.* 603, 609. [28] 7 FED. REG. 2919.

Committee on Fair Employment Practices

The Committee on Fair Employment Practices was formed by a Presidential Executive Order issued June 25, 1941,[29] and operates as a working unit of the Labor Division of the WPB. The Order specifies that all contracts let by government agencies shall stipulate that the contractor will not discriminate in employment practices against any worker because of race, creed, color, or national origin. The Committee is composed of five members whose duty it is to receive and investigate complaints of discrimination in violation of the Order and to make recommendations to the President or the Government to effectuate the Order's provisions.

Through various studies and analysis, the Committee found evidences of discrimination in a number of plants handling government contracts. In some of these, investigations have been made and directive orders issued. These orders give the officials in charge of employment written instruction to comply fully with the President's Order and tell them to cease publication of help-wanted advertisements specifying "Gentile," "Protestant," or "white." These plants must also file with the Committee a monthly report showing the number and classification of new workers employed. Some orders also provided that the industries shall give written notice to all employment agencies with which the plant does business saying that they will accept application for all types of employment without discrimination as to race, color, creed, or national origin.

The War Manpower Commission

The War Manpower Commission was established by Executive Order on April 18, 1942,[30] to formulate plans, policies, and legislative programs in order to assure the most effective mobilization and maximum utilization of the nation's manpower in the prosecution of the war. The Commission consists of the Federal Security Administrator as Chairman, and one representative from each of the following departments and agencies: the Departments of War, Navy, Labor, and Agriculture, the War Production Board, the WPB Labor Production Division, the Selective Service System, and the United States Civil Service Commission. These representatives are charged with estimating the manpower requirements for industry; reviewing the estimated needs for military, agricultural, and civilian manpower; and establishing policies for the necessary recruiting and training of workers to meet the needs. The Commission is also directed to collect, compile, and coordinate labor data of various federal departments and agencies.

The Executive Order creating the War Manpower Commission provided that ten existing agencies shall conform to the policies, directives, regulations, and standards prescribed by the Chairman. The Selective Service System was ordered to conform with respect to the use and classification of manpower needed for critical industrial, agricultural, and governmental employment; the United States Civil Service Commission with respect to the filling of positions in the Government

[29] 6 FED. REG. 3109.

[30] *Supra* note 27.

service; and the Department of Agriculture, with respect to farm labor statistics, farm labor camp programs, and other labor market activities. Activities of other agencies included were the Federal Security Agency's employment service and defense training functions; the Work Projects Administration's placement and training functions; the Railroad Retirement Board's reemployment service activities; the Office of Defense Transportation's labor supply and requirement activities; the Bureau of Labor Statistics of the Department of Labor; the Labor Production Division of the WPB; and the Civilian Conservation Corps.

Several agencies and functions were transferred to the Commission: the labor supply functions of the Labor Division of the WPB; the national roster of scientific and specialized personnel of the United States Civil Service Commission; and the Office of Procurement and Assignment in the Office of Defense Health and Welfare Services in the Office of Emergency Management. Several other agencies and functions were transferred to the Office of the Administrator of the Federal Security Agency by the Order creating the Commission. These were the apprenticeship section of the Division of Labor Standards of the Department of Labor and the training functions of the WPB's Labor Division.

The Chairman of the Commission announced that one or more directives would be issued to prevent piracy of workers in war industries. He indicated, however, that piracy of workers is only one aspect of the larger problem which the Commission must solve, namely, the most efficient use of the entire civilian manpower of the nation in prosecution of the war.

In carrying out this larger problem, the Chairman indicated that the United States Employment Service would probably be the initial mechanism. Under this arrangement, employment and transfers would be obtained through the Employment Service. "Under any of the plans now contemplated the restrictions will apply only to employers. There will be no restrictions placed upon the freedom of a worker to work where he chooses except that he must secure it through the Employment Service."

If an employer refuses to comply with methods for recruiting workers, the United States Employment Service will report this to the War Manpower Commission, the WPB, and the War and Navy Departments so that appropriate action can be taken.

If a worker refuses to accept suitable employment in a war industry without reasonable cause, the circumstances will be reported to the Selective Service System for consideration in connection with any request for deferment on occupational grounds. The Commission still has under advisement the methods by which the new policy can be enforced short of legislation.

* * * * * *

These boards and agencies dealing with our labor-management relations in this time of war are doing a necessary job in a quiet way. They seldom command headlines, but they are attacking the difficult problems of human relations which must

be solved in advance of victory days. They are providing the practical answers which are increasing our production and expediting the war effort. And, in the days to come, these agencies will stand as guideposts for future labor-management relations in an era that inevitably must rest largely upon the foundations of cooperation and mutual understanding.

APPENDIX

The name of the chief official and the address[81] of each of the existing agencies discussed in this article is listed below.

BUILDING TRADES STABILIZATION BOARD OF REVIEW
Lewis K. Comstock, Chairman
Social Security Building
Fourth Street and Independence Avenue, S. W.

BUILDING TRADES WAGE ADJUSTMENT BOARD
D. W. Tracy, Chairman
Department of Labor Building
14th and Constitution

COMMITTEE ON FAIR EMPLOYMENT PRACTICES
Lawrence Cramer, Chairman
Social Security Building
Fourth Street and Independence Avenue, S. W.

LABOR PRODUCTION DIVISION OF THE WAR PRODUCTION BOARD
Wendell Lund, Director
Social Security Building
Fourth Street and Independence Avenue, S. W.

MARITIME WAR EMERGENCY BOARD
Captain Edward Macauley, Chairman
Department of Commerce Building
14th & E Streets, N. W.

NATIONAL LABOR RELATIONS BOARD
Harry A. Millis, Chairman
326 Shoreham Building
Fifteenth and H Streets, N. W.

NATIONAL MEDIATION BOARD
David J. Lewis, Chairman
North Interior Building
F Street between Eighteenth and Nineteenth

NATIONAL RAILROAD ADJUSTMENT BOARD
J. H. Sylvester, Chairman
220 South State Street
Chicago, Illinois

NATIONAL RAILWAY LABOR PANEL
William M. Leiserson, Chairman
326 Shoreham Building
Fifteenth and H Streets, N. W.

[81] Except where otherwise noted, the address given is in Washington, D. C.

NATIONAL WAR LABOR BOARD
William H. Davis, Chairman
Department of Labor Building
14th & Constitution

SHIP STABILIZATION COMMITTEE
Paul R. Porter, Chairman
Social Security Building
Fourth Street and Independence Avenue, S. W.

UNITED STATES CONCILIATION SERVICE
John R. Steelman, Director
U. S. Department of Labor
14th & Constitution

WAR MANPOWER COMMISSION
Paul V. McNutt, Chairman
Social Security Building
Fourth Street and Independence Avenue, S. W.

THE LABOR FORCE: ITS RECRUITMENT AND TRAINING

JOHN J. CORSON*

War has always drawn heavily on the combatant nations' resources in manpower. World War II is destined to tax the human resources of the United States to an even greater degree than has been the case in wars of the past. This country must, first, recruit the largest army in its history. Second, it must recruit an army of industrial workers sufficient to produce the munitions and equipment for this army while maintaining production sufficient to meet the essential needs of the civilian population for goods and services. And, third, it must allow for additional industrial and agricultural production sufficient to assure the foodstuffs, planes, guns, tanks, and ships required by our allies.

What are our human resources for the tasks upon which our future as a free people depends? In December 1940[1] the labor force comprised 53.2 million persons, of whom all but 7.1 million were employed. At the time of the last census, in March 1940, some 10.5 million workers were employed in manufacturing, 7.5 million in wholesale and retail trade, 2 million in construction, and 8.4 million in agriculture.[2]

Available figures for 1941 and estimates for future years,[3] however, demonstrate that the size and distribution of the labor force is changing materially. For instance, from December 1941 to December 1942 the total labor force increased 3.3 million or about 6%, while the number in war employment rose 10.6 million or about 150%. Thus it is expected that by December 1942 this nation's labor force will number 53.2 million,[4] of whom all but 2.4 million will be employed. Of the 50.8 million employed, some 17.5 million or about 34% will be employed in war in-

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[1] These figures represent the joint estimates of the Bureau of Labor Statistics of the U. S. Department of Labor and the Bureau of Employment Security of the Social Security Board.

[2] U. S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, Series P-10, No. 11 (April 29, 1942).

[3] Labor force estimates for 1942 and 1943 exclude the number of men and women in our armed forces.

[4] See note 1, *supra*.

dustries. By December 1943, it is estimated, our labor force will have increased to about 53.3 million persons and the number in war industries to 20 million, an increase of about 15% over 1942 and of about 190% over 1941.

Mere attainment of this volume of labor is, of course, not enough. It is necessary also that the labor force be efficiently allocated among war industries and essential civilian industries, according to their requirements and their relative importance in the war program. To meet the President's war production schedules, which call for 8 million tons of shipping, 60,000 planes, and 45,000 tanks in 1942, and 10 million tons of shipping, 125,000 planes, and 75,000 tanks in 1943, and to attain the equally staggering farm production goals,[5] workers will have to be recruited from nonessential industries and from hitherto untapped sources of labor supply. Manufacturing, for instance, will probably be using 16.5 million workers by December 1942—more than double the number at the time of the 1940 census—and 18.8 million by December 1943. Between December 1942 and December 1943, employment in construction is expected to decrease from 1.7 million to 1 million, and in wholesale and retail trade from 6 million to 5 million. In the same period, agricultural employment is expected to decrease from 7.8 million to 7.5 million because of shortage of workers.

The Chairman of the War Manpower Commission, Paul V. McNutt, recently pointed out that although only 6.9 million workers were engaged in war work on January 1, 1942, the number had increased to 12.5 million by July 1, 1942, and that 5 million more workers will be needed before the end of this year. This gain in war employment, he declared, "shows that industry and Government have struck their stride in producing for war. It also shows that a very large percentage of the industrial workers in peacetime production are shifting over to war production."[6]

As the labor force swells, increased attention must be paid, moreover, to the incessant demand for skilled workers. The Bureau of Labor Statistics estimates that by the fourth quarter of 1942 no fewer than 32% of the total number of workers engaged in war-goods manufacturing will be skilled workers, 44% will be semiskilled, and the remaining 24%, unskilled. Already shortages of skilled workers in critical lines such as metal trades, aircraft, shipbuilding, and ordnance are affecting production schedules. One of the most effective methods for combatting these shortages is training.

The three big problems ahead of us, then, are the development of an adequate total labor supply, the most effective allocation of labor among industries, and the training of a sufficient proportion of skilled workers. Since the problem of allocation is considered elsewhere in this publication,[7] I shall discuss two of these problems—recruitment and training. Energetic recruitment and comprehensive train-

[5] The goal of our "Food-for-Victory" program for 1942 includes: 125 trillion pounds of milk, 3.8 billion dozen eggs, 83 million hogs, 95 million acres of corn, and 40 million acres of tomatoes.

[6] War Manpower Comm'n Release PM-3760, July 13, 1942.

[7] See Stocking, *Allocation of Manpower, infra* at p. 430.

ing can ensure our ability to meet the needs of our industries both as regards quantity—the labor supply—and quality—the required skills.

SOURCES OF LABOR FORCE

Workers in the labor market. To expand our labor force sufficiently, workers must be recruited from sources which hitherto have been untapped and present labor must be more effectively utilized. We now have several million partially employed workers, part-time workers, and casual workers.[8] Full-time employment for every man and woman now employed means a greater total volume of labor. In other words, the goal is not only a greater total labor force but also a full-time labor force.

Many additional workers will be recruited from among persons now employed in nonessential industries. In December 1941, 29.1 million persons were engaged in non-war production. For December 1942, the number so employed is estimated at 20.5 million and for December 1943, at 19.1 million—a decrease of 34% in 2 years. This transfer of labor will be accomplished by curtailing all but essential civilian production, by converting nonessential plants to war work, by conserving machinery, and by concentrating production so that men and plants are working at full capacity.

As of May 1942, it is estimated, the labor force included some 2.6 million unemployed persons, including employable and so-called "unemployable" individuals. No hard-and-fast line can be drawn between these two categories. When the demand for workers is great, employers are willing to give the hitherto unemployable a chance to fit in. "Employability," therefore, depends in part on the times. In Great Britain, studies of experience with so-called unemployable persons revealed that a large proportion could be used in the war effort after a period of readjustment and training. To accomplish this result, special effort is undoubtedly necessary, but it is effort well expended. A significant proportion of the unemployed is made up of Negroes and members of other minority groups who because of race, color, or creed, find it difficult or impossible to get jobs. As the demand for labor bears more and more heavily on the available supply, these workers will also be called to employment.

According to the National Industrial Conference Board, unemployment in April 1940 totalled 9 million. For the same month in 1942, the figure was about 1.7 million. The Work Projects Administration estimated the number of unemployed workers at 8.8 million in April 1940 and 3 million in April 1942. Thus, on the basis of two different types of unemployment estimates, the ranks of the unemployed had shrunk by from 7.3 million to 5.8 million. The so-called "hard core" of unemployment—the groups of workers who have been without jobs for many years—is rapidly dissolving.

[8] The "partially" employed are those who are ordinarily fully employed but do not have full-time weekly employment. "Part-time" workers are those who, generally through choice, work only a part of the time each week. "Casual" workers are persons engaged in lines of work which do not occupy them regularly and which are generally outside their usual occupations.

"Additional" workers[9] *not ordinarily in the labor market.* A main source of additional workers is to be found among younger married women who live in industrial centers. Only a relatively minor portion of the additional female workers can be drawn from the ranks of unmarried women, since a large proportion are already gainfully employed or are responsible for the care of families.[10] Because most of the increase in labor supply will be needed in the centers of war production, comparatively few women can be taken from the rural areas and small towns. However, housewives with young children, whether they live in rural or industrial areas, will be unable to accept employment unless adequate arrangements are made to care for the children. The Bureau of Labor Statistics has estimated that there are 4.9 million non-farm housewives who are aged less than 45 and have no children under age 10. These women are generally considered the most likely to be employable. The number of non-farm housewives aged 45 and over has been estimated at 9.3 million. Unless we recruit nearly every woman under 45 who has no young children, it will be necessary to draw heavily on non-farm housewives over age 45. The younger group will be employed in full-time essential jobs; the older group, in whatever full-time work is suitable, in part-time work, and in volunteer activities.

It will be necessary to overcome existing prejudice against the training and hiring of older women. Prejudice against women workers in general, like that against various minority groups, has far from disappeared. Recent surveys of the Bureau of Employment Security indicate that, although women are capable of working in four fifths of the occupations in war industries, they are found in only a tenth. In January 1942 the Bureau made a special study of the employment of women in more than 12,000 war-industry establishments which expected to hire about 676,000 additional workers by June 1942. The study revealed that employers did not plan to employ women in over two thirds of the anticipated skilled jobs and 82% of the professional and managerial jobs. It is most significant that experience with women workers has been favorable in plants concerned with ammunition, electrical machinery, rubber products, nonferrous metal, and aircraft. Such experience, together with the continued transfer of male workers to the armed forces, will eventually dissipate these prejudices.

Another source of additional workers lies in our youth, including those attending school, high-school graduates, and young people leaving school in order to enter employment. It is relatively easy to recruit workers from among the approximately 2 million students aged 18 years and over. They are usually eager to get jobs, and the problem here is not recruiting, but appropriate training. Of greater

[9] This interesting subject has evoked much comment from economists. See Woofter, *Will Defense End Unemployment?* (May, 1941) HARPERS, 625-630; Woytinsky, *Additional Workers and the Volume of Unemployment*, SOCIAL SCIENCE RESEARCH COUNCIL, PAMPH. SERIES No. 1 (Jan. 1940); and Humphrey, *Alleged "Additional Workers" in the Measurement of Unemployment* (June 1940) 48 J. OF POL. ECON. 412-419.

[10] "Only about 6 percent of the homemakers are single, in contrast to the more than 53 percent found among women in the labor force." (July 1942) 5 SOCIAL SECURITY BULL. No. 7.

concern is the large number of young boys and girls, who in large numbers are leaving school and entering the labor market.[11] Because of their youth and inexperience, these workers require careful supervision and protection from hazards. The age group 14-18 years contains nearly 10 million boys and girls of whom 4.8 million are 14 and 15 years of age and 4.9 million are 16 and 17 years. These youngsters are taking many kinds of jobs such as those of messenger boys, helpers in stores, machinists' helpers, machine operators, and attendants at amusement places. From 1940 to 1941, placements by the United States Employment Service (USES) of youngsters aged 16-17 years increased 85%, and of those in the lower age group, 79%. These figures fail to tell the whole story since they do not include large numbers of children who work on farms.

The labor force is being expanded by the increasing numbers of retired workers, who are voluntarily returning to industry, at least for the duration, as well as those who are staying at work at ages when they expected to retire. Some of these older men are taking the place of employed younger men who are drafted or transfer to war production. Others are, themselves, working in essential war production jobs in lines in which they had previously worked. An increasing number of persons age 65 and over are not applying for old-age and survivors insurance benefits, though eligible, or are actually giving up their monthly benefit for jobs. It is estimated that about half a million workers, qualified for retirement benefits under the Social Security Act, are continuing to work. From 1940 to 1941 the number of workers awarded monthly retirement benefits under the federal old-age and survivors insurance system decreased 13%.

Still another source of additional labor is found among the physically handicapped. It is estimated that there are approximately 2.2 million physically handicapped persons between the ages of 17 and 64 in the United States. A survey of 68 of the country's largest industrial corporations, conducted by the National Industrial Conference Board,[12] revealed uniformly favorable experience among companies which employed physically handicapped persons. Blind workers performed satisfactorily on assembly lines, in tasks requiring manual dexterity, and as typists. Persons with defective hearing were found particularly adept at inspection work. The problem in the recruitment and training of physically handicapped persons is essentially that of adapting the job to the worker rather than the worker to the job. The possibility of salvaging human assets and freeing this group from economic dependency will compensate for the extra effort needed to recruit and train the physically handicapped.

Miscellaneous sources of labor supply. Workers engaged in multiple jobs and vacation work do not properly belong in the economic concept of "additional"

[11] This group does not include an estimated number of 700,000 who have regularly been leaving school each year.

[12] Knox, *Employment of Handicapped Persons* (Dec. 1941) 3 CONF. BD. MANAGEMENT RECORD 151-154.

workers. However, since they do "add" to the labor force, their labor potentialities must also be considered. In some states, teachers may hold two jobs, one in a day school and one in a night school. This principle can be extended among persons engaged in seasonal work. For example, there can be increased employment of farmers and other seasonal workers in local essential industries during off-seasons. By allowing school credit for certain types of work, schools can stimulate vacation employment of teachers and students. Many of the self-employed, who number about 6 million, are in businesses which are suffering because of priorities, curtailment, and material shortages; such persons can supplement their earnings by taking essential jobs.

Inmates of prisons, interned aliens, and prisoners of war constitute other sources of labor. Among the 160,000 inmates of state prisons, about 40,000 are trained industrial workers, 40,000 to 50,000 are unskilled and semiskilled, and from 15,000 to 20,000 are farm workers. It is estimated that they can produce about $100 million of war materials annually. We can recruit workers also from among the approximately 100,000 Japanese who have been evacuated from the West Coast for the duration of the war. If we are called upon to feed, house, and clothe prisoners of war, we should be prepared to utilize them in essential war work wherever possible.

Measures to increase productivity. To complete our inventory of sources of labor, certain factors which lead to increased production must be considered. One such measure is increasing the hours of work of the individual workers, or overtime. There has been considerable controversy as to the merits and demerits of overtime, and critics and proponents alternately point to British and German experience as proof of either position. In view of the difference in production methods, however, it is not certain to what extent we can safely draw comparisons based on the industrial experience of other countries. Undoubtedly, excessive overtime work here, as elsewhere, will increase fatigue, which in turn will increase the accident, sickness, and general absenteeism rates. The hazards are further aggravated by the increased tempo of war production, the introduction of new machinery, and the use of new workers.[13]

In the interest of increased "worker efficiency and production," eight United States Government agencies have jointly subscribed to a statement urging employers in war production to limit working hours in their plants to 48 hours a week and 8 hours a day. The interdepartmental statement pointed out that irregular and excessive hours of work on private and public war projects have resulted in "labor piracy," increased accidents, absence from jobs, illness, and a deterioration in quality of work.[14] Under these circumstances, reliance on hours of work alone to increase

[13] According to the Bureau of Labor Statistics, accidental deaths and permanent total disabilities in industry increased from 16,400 in 1939 to 18,000 in 1940 and disabling injuries from 1.4 million in 1939 to 1.9 million in 1940.

[14] Statement issued on July 28, 1942, by a committee representing the War, Navy, Commerce, and Labor Departments, Maritime Commission, War Manpower Commission, War Production Board, and U. S. Public Health Service.

output can only be regarded as foolhardy. However, hours of work can be increased judiciously if at the same time every care is taken to guard against fatigue and to preserve the workers' health by installing proper safety devices and adequate first aid and medical facilities, and by maintaining satisfactory working conditions.[15]

Other measures whereby production can be increased include upgrading and job simplification. Workers in a plant can be upgraded successively to the jobs next higher in line as openings occur. Such workers require shorter periods of training and adjustment than do new workers. Jobs requiring highly skilled workers can be broken down into component parts and filled by semi-skilled and unskilled workers who may require little or no training to perform the simplified tasks. In other words, we can apply the principle of the division of labor to individual jobs.

RECRUITING ACTIVITIES OF USES

This inventory of our labor resources, summarized in the preceding pages, has touched on "employed" workers, "additional" workers, miscellaneous groups, and measures to increase productivity. My purpose in giving this summary has been twofold—to call attention to the many untapped sources of labor supply and to indicate the magnitude of the task which confronts the United States Employment Service in fulfilling its responsibilities for labor recruitment. In the words of President Roosevelt, "Now that this country is actually at war it is more than ever necessary that we utilize to the fullest possible extent all of the manpower and womanpower of this country to increase our production of war materials. This can only be accomplished by centralizing work recruiting into one agency."[16] This agency—the USES—has thus been charged with the responsibility for rationalizing the labor market and eliminating waste in the use of the labor force.

Since January 1, 1942, when the USES became a nationally operated organization, it has comprised some 1,500 full-time offices located in the business and industrial centers of the nation and about 3,000 part-time and itinerant offices operating in less populous and outlying communities. During this period, the USES has curtailed or eliminated a number of its functions which, though appropriate and useful in peacetime, were not contributing directly to the war effort. Its present functions are designed primarily to serve establishments engaged in essential activities. By directing workers to jobs in essential production with a minimum loss of time between jobs, the USES is contributing to the expansion of the labor force.

[15] On the basis of a survey of 140 companies employing 2 million workers, J. Douglas Brown came to the following conclusions: (1) optimum of hours of work are approximately 8 per day and 48 per week, (2) opinion and experience both indicate a lower optimum for women than for men, (3) workers need one day of rest in seven, (4) in any upward change in hours, special attention should be given to attendance and safety, (5) the need for longer hours should be made clear to the employees and the results in terms of productivity given to them regularly, and (6) in determining optimum hours for maximum productivity, the length of the emergency period must be considered. BROWN, OPTIMUM HOURS OF WORK IN WAR PRODUCTION (Industrial Relations Section, Dept. of Economics and Social Institutions, Princeton Univ., 1942).

[16] Quoted from the telegram sent to all Governors on December 19, 1941, concerning the establishment of a nationally operated United States Employment Service.

Fortunately, even before the declaration of war, steps had been taken which prepared the USES for its emergency duties. A registration system, which has been in use since 1933, provided a record of the skills, training, experience, and work preferences of large numbers of applicants at the employment offices. Aptitude and vocational tests designed to measure an individual's fitness and capacity for many types of employment and occupations had been developed. In a project that has attracted nation-wide attention the USES compiled the *Dictionary of Occupational Titles,*[17] a work that defines and classifies more than 17,000 specific jobs in over 130 industries. This vast sum of organized information has enabled the local offices to determine readily the niche which the individual worker can best fill in our war and essential civilian industries and has helped to determine the type of war production to which a plant can be converted most readily.

Moreover, in the Farm Placement Service, a means was provided to facilitate the placement of agricultural workers in their customary work. The Farm Placement Service collects and makes available important information on the seasonal demand for labor in various areas, the extent of the demand, the nature of the work, its anticipated duration, and wages offered. In a radio address to the Nation on March 9, 1942, President Roosevelt declared that "food, like the tanks and planes, is absolutely indispensable to victory." The agricultural program has thus been officially recognized as an essential part of our direct war effort as well as an essential civilian activity.

The USES was not confronted, like many other war agencies, with the necessity of starting from scratch in tackling recruitment and training problems. In addition to the activities already established, however, new methods had to be applied and old methods expanded.

Among the steps the USES has taken in recent war months to facilitate recruitment and training is a basic occupational inventory of all men between the ages of 18 and 65. This National Occupational Inventory, which has been conducted in cooperation with the Selective Service System, is a primary step in organizing an orderly recruiting program. It provides information as to male workers and their skills which was not available under the former registration system of the USES. It includes professional and managerial workers, who seldom register with the employment service, as well as workers with skills in critical occupations who might never have registered. On the basis of these questionnaires, the USES will classify all employed and unemployed men into (1) critical occupations, (2) essential occupations, and (3) neither critical nor essential occupations.[18] The first group will be further classified to indicate men working at a critical occupation on an essential product and men not so employed. The immediate objective of this sorting pro-

[17] In 4 parts, prepared by the Occupational Analysis Section, U. S. Employment Service Division, Bureau of Employment Security, Social Security Board, Federal Security Agency (1939, 1941).

[18] A "critical" occupation is one in which the reported national demand is greater than the available supply. An "essential" occupation is one in which a shortage does not now exist but is anticipated and for which training cannot be completed within approximately 6 months.

gram is to provide a basis for orderly recruiting of the labor force for those occupations in which critical and essential shortages exist.

Clearance[19] is another device utilized by the USES to facilitate the recruitment of workers for essential war industries. To put the clearance procedure on a war footing, the USES has urged employers to use their employment representatives as authorized hiring agents. Thus, if the local employment office is unable to fill the employer's order, the employment office locates properly qualified workers and arranges a time and place for bringing them and the employer's agent together. The agent interviews the workers and can hire them on the spot and also make transportation arrangements.

Because of the war program, the demand for farm labor now exceeds the availably supply, especially in Texas and the Far West. Since the migratory labor on which many farmers ordinarily rely is not appearing, perishable fruit and vegetable crops are endangered. As a result, demand has arisen for importing Chinese and Mexican labor from Mexico and Cuba.[20] To recruit farm labor, the USES, when the situation in a farm area becomes crucial, appeals to the community in a truly democratic fashion. Many communities have cooperated inspiringly. Housewives, businessmen, elderly persons, and school children have volunteered to harvest the local crops, while their communities have provided bus service and picnic lunches. Valuable crops which would otherwise have gone to waste have thus been saved.

Increasingly, the USES is endeavoring to recruit workers to meet the *specific* needs of essential employers for immediate hiring as well as definite commitments concerning the specific numbers and types of workers to be requested through the employment service in the future. For instance, where the USES used to take requests from an employer for a machinist, it now requires the employer to stipulate the kind of machinist he wants. American industry, which has been famous for its precision work, may thus gain further impetus by precision recruiting.

TRAINING OF LABOR FORCE TO MEET WAR-PRODUCTION NEEDS

The expansion of the labor force and its adaptation to war needs are placing increasing emphasis on the training activities of the USES and other agencies charged with responsibility for training the requisite number and kinds of workers. As the demand for labor increases, the war training program will have to lay even greater stress on increasing the labor force by training workers in the areas where they are needed and in the skills for which a demand exists. For instance, in areas

[19] Clearance is a procedure for the interchange between employment offices of information about unfilled jobs and/or available applicants with the object of facilitating the referral of applicants in one employment office to job openings available through another office.

[20] Lawrence E. Davies in N. Y. Times, July 9, 1942, p. 11: "Governor Olson [California] declared that efforts still were being made to have thousands of Mexican farm laborers brought in for the heavy harvest work in the late Summer and Fall, but he, as well as other officials, were not much encouraged over the prospect. He said he would take up with C. T. Feng, the Chinese Consul General here, the proposal, advanced two days ago, for the importing of 5,000 alien Chinese from Cuba and possibly 3,000 others from Mexico."

where the available supply of experienced labor has been exhausted, increasing numbers of women and other previously nonemployed groups must be trained. The skills needed for critical and essential occupations, such as arc welder, engine-lathe operator, ships carpenter, and loftsman, must be developed by training unskilled and semiskilled workers, workers engaged in nonessential occupations, or those with related skills. In general, the USES attempts to eliminate training which will not be utilized immediately by the trainee and for which no demand exists in the area in which the worker is trained. In certain critical occupations, however, training is recommended whether there is a demand for such workers in the local area. Training in arc welding, for example, is given wherever training facilities are available, because the demand for workers with this skill exceeds the supply and is expected to increase.

To facilitate the employment of persons without previous work experience, preemployment training is provided by the United States Office of Education in cooperation with state vocational training schools. The responsibility of the USES in connection with the preemployment training courses includes: determining employer needs and specifications, recommending suitable training and number of persons who should be trained, recruiting trainees, and placing trainees in jobs utilizing training as soon as they are ready for employment.

The training program of the National Youth Administration includes work projects designed to give inexperienced young persons basic experience in industrial types of work vital to war needs. Trainees have approximately 3 months of practical on-the-job training in NYA shops, where they learn the principal operations and use of machines and tools used in machine shops, sheet metal shops, in welding, forge and foundry work, aircraft mechanics, electrical equipment and radio manufacture, and pattern making and joinery. Other projects train young people in industrial sewing and as hospital attendants. In cooperation with the USES, the NYA is using resident centers to facilitate the transfer of workers from areas of labor surplus to localities where their services are in demand. At the Nepaug Center in Unionville, Connecticut, for example, young persons who have completed training elsewhere receive additional training for specific work and also their subsistence while they are interviewed by the USES and referred to employers who need workers. During 1941, the NYA program supplied more than 421,000 trainees for private industry, of whom 210,000 went to war industries.

Another training program for youth is conducted under the auspices of the Apprenticeship Section.[21] Under this program, young persons learn a trade and become skilled craftsmen in accordance with standards approved by organized labor and employers. The Apprenticeship Section brings employers and labor together on the question of training and places at their disposal any techniques that may have been acquired through similar programs, through practical experience with

[21] Transferred from the Department of Labor to the Federal Security Agency by Executive Order No. 9139, April 18, 1942, 7 FED. REG. 2919.

the training problems in a given trade, or through the dissemination of practices and procedures which it has gathered from many trades and industries.

The conversion and placement of unemployed workers has been the primary objective of the Training and Reemployment Program of the Works Project Administration. The WPA Vocational Training Program has provided courses for needy workers who receive subsistence wages while in training. Approximately 70% of those who have completed training under this program have transferred from WPA rolls to jobs, and the balance has been absorbed rapidly. In addition, the WPA conducts an Auxiliary Shop Training Program which involves use of machine, welding, and sheet metal shops where equipment may be idle because of lack of orders or priorities. The In-Plant Pre-employment Training Program of the WPA utilizes facilities in privately or publicly operated plants. Under this program, workers have a short training period, usually about 4 weeks, while on the job. About 1,650 plants are cooperating in this program which has a record of better than 90% placement of its trainees.

The Training-Within-Industry Branch of the Federal Security Agency is concerned with training on the job. It provides a practical advisory service to employers on in-plant training, furnished under the supervision of training experts most of whom have been loaned by industry. Representatives of the Branch diagnose the training needs of individual plants, help to set up in-plant training programs adapted to these needs, and bring manufacturers in touch with training services available in the area. From September 1941 through March 1942, this program had served some 1,520 plants employing some 1.2 million workers. TWI also runs a training program to instruct key employees—foremen, supervisors, and experienced craftsmen—in ways of passing their knowledge along effectively and quickly to less experienced workers. By March 1942, 74 individuals had received job-instructor training and had, in turn, trained and certified approximately 2,000 war-production trainers, who, in their turn, had trained about 41,000 other men and women throughout the country as job instructors. Although there is no way of knowing the number of workers who have learned from these instructors, an estimate of from 300,000 to 400,000 is reasonable.

For workers who have not utilized their skills for a long time, refresher courses are available to enable them to "brush up" on their skills. For workers who wish to improve or expand their skills, there are supplementary courses which help them to qualify for more specialized or more complicated tasks. Such courses are provided under a program of Vocational Education for National Defense maintained by the United States Office of Education in cooperation with state vocational training schools. Training is provided in such occupations as aviation services, construction, drafting and blueprint reading, electrical services, machine-shop practices, radio maintenance and repair, ship and boat building occupations, and such other occupations as may be approved from time to time as essential to the operation of

war industry. Participating in this program are more than 2,400 trade and industrial schools, representing an investment of over a billion dollars, and some 3,400 centers for out-of-school youth courses. From July 1940 through January 1942, more than 2¼ million persons had received training under this program. Of the 2¼ million total trainees, nearly 1 million who are employed in war industry have taken supplementary courses in order to upgrade them for more responsible work.

This is by no means an exhaustive résumé of the training facilities now operating to speed our war effort. It fails to take into account private commercial schools, which annually turn out thousands of secretaries, typists, bookkeepers, calculating machine operators, and other types of office workers, and also the technical schools of our colleges and universities, which provide chemists, physicists, engineers, metallurgists, radio technicians, physicians, and other workers essential to the war program.

The ultimate limits of the labor force, and the techniques used for its recuitment and training, will be determined by the course of the war. If the war is long and production goals increase, it will be necessary to rely more and more on hitherto untapped and untrained sources of labor. As women, youth, older persons, and physically handicapped individuals are drawn into our army of production, facilities to ensure their orderly entrance into the labor market become increasingly important. At the same time, every effort must be made to provide full-time jobs for the unemployed and for those not fully employed, and to use fully, in essential activities, all our resources in plants and equipment. If all these methods prove inadequate, it may be necessary to rely on compulsory measures to recruit and train the necessary workers.

The time may never come when this country will be obliged to order its men and women to work in certain industries and occupations in those areas where they are needed, or to limit the employer's right to hire and fire. We shall rely on voluntary methods and procedures unless they prove inadequate to assure our maximum war effort. If the war necessitates the use of some measure of compulsion, it is to be confidently expected that here, as under our present voluntary measures, the most effective course of action will be that mapped out on a cooperative basis, by and with the advice and consent of management and labor.

ALLOCATION OF MANPOWER

COLLIS STOCKING*

Total war requires the systematic assignment of a nation's resources to assure that every item is fully utilized. In terms of manpower each individual must be fitted into the place where he or she can contribute the most. This means that some persons must be assigned to military duty. But not every person qualified for military duty should be permitted to join the service. Some individuals because of their training and experience can serve best in industry and other activities necessary for the support of the war effort.

From an industrial standpoint the requirements of war are the concentration on supplying those things needed for prosecuting the war and supporting civilian life, and the elimination wherever indicated of all nonessential production and services (nonessential measured in terms of contribution to the war effort). Industry can readily use many persons not suited for military service, including a majority of the persons rejected by the army on physical grounds, in addition to women, youths, and "over-aged" workers both skilled and unskilled. But, these workers cannot make the needed planes, tanks, ships, guns, and equipment, except with the guidance and assistance of engineers, supervisors, and skilled craftsmen. Some of the men in these trades and professions are also needed in the army. Indeed it is frequently pointed out that a modern army in some respects resembles a gigantic mobile factory. There are ground crews, repair crews for tanks and ships, in addition to signal and engineering corps, and other specialized units. In many cases, however, the skills required by these specialized units are basic skills adjusted to meet a special situation—ability to perform under combat conditions. Even skilled workers taken from industry generally have to undergo considerable retraining. It would seem, therefore, that military needs for skilled workers should be met as far as possible by training unskilled workers, especially since the complete control over the individuals to be trained provides an opportunity to reduce training time to a minimum.

Under present circumstances, the armed forces and industry directly compete in the recruitment of manpower. The Selective Training and Service Act[1] renders all men from 20 to 45 years of age liable to military service. Deferment is provided for certain government officials, ministers, and ministerial students, and men who are

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[1] Act of Sept. 16, 1940, §3, 54 STAT. 885, 50 U. S. C. §303.

physically, mentally or morally deficient or defective. In addition, deferment may be granted to men on grounds of dependency and occupational status.

The provisions for occupational deferment can best be understood in light of the deferment experience in the First World War. At that time the acute need for shipping facilities led to the deferment of all shipyard workers. Occupational and worker analysis was in only an elementary stage, and in the deferment of shipyard workers the authorities failed to take into account the fact that many of the workers thus deferred could have been replaced by workers not liable or acceptable for military service. As a consequence, many skilled and unskilled workers alike found themselves engaged in lucrative work in a "sheltered" industry, while many other workers, better qualified occupationally, were inducted into the army. Resentment was expressed in an avalanche of criticism of the operation of the Selective Service System. It was with vivid recollection of this experience that the Selective Training and Service Act was drafted in 1940.

The Act permits the deferment of men engaged in activities necessary to the maintenance of national health, safety or interest.[2] This general provision is hedged in by another provision which specifically forbids deferment from military service except on the basis of the status of each individual.[3] No deferment can be made of individuals by occupational groups or by group in any plant or institution.

The responsibility for determining whether or not a registrant is engaged in an activity necessary to the maintenance of national health, safety, or interest and therefore eligible for deferment is left to the local board in the first instance. For the guidance of the local board the Director of the Selective Service has ruled[4] that a registrant should be considered for occupational deferment only if:

1. He is engaged in an activity necessary to war production, or an activity essential to the support of the war effort, or would be so engaged but for a seasonal or temporary interruption;
2. He cannot be replaced because of a shortage of persons with his qualifications or skill in such activity;
3. His removal would cause a serious loss of effectiveness in such activity.

When the Selective Service System began to operate late in 1940 fear was expressed in some quarters that it might result in skilled workers needed for war production being drawn off into military service. At the time, however, there was still considerable unemployment and industry was not generally converted to war production. Moreover, only a limited number of men—less than a million—were to be inducted in the army annually and these for only one year of training. Although the law was subsequently amended to permit keeping the men in the army for a longer period of time,[5] those 28 years of age and over began to be mustered out in the Fall of 1941. In this connection, special employment offices were established in

[2] *Id.* §5(e), 54 STAT. 887, 50 U. S. C. §305(e). [3] *Ibid.*
[4] Selective Serv. System Memo. I-405, March 16, 1942, 1 C. C. H. War Law Serv. (2d ed.) ¶18849.
[5] Act of Aug. 18, 1941, §2, 55 STAT. 626, 50 U. S. C. (Supp. I) §352.

the larger army camps for directing skilled workers among the discharged soldiers to employment in war production.

With the declaration of war and the tremendous expansion of war production, the unnecessary loss of highly skilled workers to military service became a serious matter. No longer are men being selected for limited military training. They are being selected for the duration. The number to be inducted in the army cannot be measured in hundreds of thousands. Now it is an undetermined number of millions.

At the same time industry is being generally converted to war production and new facilities rushed to completion. The test of whether or not a particular skilled worker can be replaced is an inadequate safeguard against the loss of workers necessary for war production.

There is still a great deal of labor turnover, and in a substantial number of cases an individual worker can be replaced. However, many employers engaged in essential production have protested that the local Selective Service Boards have failed to defer key employees. This is probably because the expanding demands of war production are such that both the inductee and the man or woman recruited to replace him are needed.

The problems of allocating manpower are being constantly reviewed and some modifications in recruiting practices have been recently effected. Among other things the War Manpower Commission has been established[6] to formulate plans and programs and establish national policies for the most effective mobilization of our manpower. One of the first acts of the Commission was to order the United States Employment Service to prepare a list of essential activities and a list of essential occupations. The activities list will include (1) essential war activities, (2) activities required for the maintenance of war activities, and (3) activities essential to the maintenance of national safety, health, and interest. When the list is completed, it will contain six or seven hundred industries and segments of industries, covering the whole range of activities connected with war production and services. The occupational list will include occupations, crafts, trades or skills, or professions required in an essential activity in which an individual is unable to attain reasonable proficiency within less than six months of training or experience. It is estimated that this list will include 3,000 skilled and semi-skilled occupations, from airplane assemblers and mechanics to machinists, toolmakers and yard-masters.

The War Manpower Commission also requested the Director of the Selective Service to supply all local boards with copies of the lists of essential activities and occupations; and to instruct local boards that, to the extent required for the maintenance of essential activities, they are (1) to defer workers from military service, and (2) to allow qualified workers to establish grounds for deferment by permitting them to transfer to war production if they are not already employed in war industries.

Without waiting for the United States Employment Service to complete the lists of activities and occupations, the Selective Service has proceeded to translate the War

[6] Exec. Order No. 9139, April 18, 1942, 7 FED. REG. 2919.

Manpower Commission policy into instructions to local boards. If a local board is in doubt whether a registrant is engaged in an essential activity and can be replaced if inducted into the army, the local board is supposed to check with the Employment Service. If a replacement cannot be found, the local board is supposed to give due consideration to the report of the Employment Service in deciding whether the registrant should be inducted into the army or continue in the essential activity in which he is engaged.

In case of a registrant qualified in an essential occupation and not engaged in an essential activity, the local board is supposed to refer such registrant to the Employment Service for interview. The local employment office may be allowed 30 days in which to place the registrant in an essential activity, so as to utilize the occupational skill possessed by the registrant. If a transfer is effected, the local board is to give due consideration to the change in the occupational status of the registrant in completing the classification. If such a transfer of worker cannot be effected within the time allowed, the classification may be completed and the registrant inducted into the armed forces. The delay in classification of registrants will in some cases avoid the induction into the armed forces of qualified workers needed in war production, who happen to be otherwise engaged at the time they are classified.

While this new policy constitutes a significant advance in manpower allocation, the procedure is by no means perfect. Maybe enough occupational deferments have been granted. To date they amount to roughly 4% of the 18,000,000 men included in the first and second registrations. One thing seems certain, however, if we are to recruit an 8- to 10-million-man army: there have been too many deferments for physical defects. Such deferments have been running from 40 to 50% of all registrants reporting for physical examinations. Such a high percentage of rejects on physical grounds might be justified if the size of the army were to be only 3 or 4 million men. There can be no justification, however, for insisting on physical perfection when it becomes necessary to take as many as 20% of the entire eligible group. With an army of, say, 8 million men it is highly unlikely that the entire force will ever see combat duty. Many persons with physical defects can be used to perform non-combatant duties. The recently announced policy of the Army of accepting men who are not physically perfect should relieve some of the pressure on local boards trying to meet quotas based on the number of persons registered and qualified for military duty. Insofar as the pressure on local boards is relieved there will be more opportunity to defer skilled workers needed in industry.

When it comes to maintaining anachronistic recruiting requirements, industry has also been at fault. Employers have been slow to abandon the high requirements to which they became accustomed when they could pick and choose in a surplus labor market, and have refused to employ women and members of minority groups. In a tight labor market such as exists today, and under circumstances in which our total manpower is needed, employers will have to use skilled workers efficiently and sparingly and train a substantial proportion of their labor force.

In order to conserve the existing supply of skilled and semi-skilled workers, less emphasis should be placed upon the immediate replaceability of an individual registrant about to be inducted into the military forces. In determining whether the available supply is large enough to permit the induction of a registrant in an essential activity, not only present demands for such workers should be taken into account, but also the demands that will develop in the next 6 to 12 months. In many occupations this latter demand will more than absorb the current supply of workers who may be unemployed or employed in nonessential activities.

The deferment policy should also take into account the difference in training time required for reasonably proficient performance in the various essential occupations. A registrant engaged in an essential occupation requiring 6 months to one year of training or experience should ordinarily be deferred for 3 months. A registrant engaged in an essential occupation requiring one year or more of training or experience should ordinarily be deferred for 6 months. At the end of the period the registrant's case should be re-examined in light of the new requirements of the armed forces and of industry to determine whether or not the deferment should be extended. Such a deferment should be granted not as a privilege to the registrant or to his employer, but in the interest of the war effort, which cannot afford any interruption of production. Except for the difficulties arising out of the quota system whereby local boards are under terrific pressure to supply men for the Army regardless of the circumstances, the deferments suggested here could in most cases be made without interfering with the induction of a sufficient number of men to meet the goals established by the military authorities.

With the assurance of uninterrupted production the deferment policy could be adjusted from time to time to take into account the relative needs for a larger army or increased production. When these adjustments are made, some of the men who may have been previously deferred because of their employment in essential occupations may have to be inducted into the army. Accordingly, it is imperative that employers proceed immediately to train replacements for men deferred on occupational grounds. For occupations requiring from 6 months to one year of training or experience, it will be possible in many cases to train replacements in a much shorter period of time through upgrading of workers with some experience. For occupations requiring more than one year of training or experience, the training of replacements will frequently be more difficult and will, in some cases, be virtually impossible. In all cases, however, the employer should be put on notice that the necessary training should be undertaken at once. At the same time the United States Employment Service should be notified, since it is responsible for assisting the employer in recruitment of trainees and for making recommendations to the public authorities as to the need for training courses.

There are two aspects to the problem of allocating manpower among civilian activities necessary for the prosecution of the war. One is the geographic distribution

of the workers, and the other is the allocation of workers among industries and individual plants within the industries engaged in war production.

The first orders for war materials were placed in established industrial communities. Here were located plants and facilities, managerial abilities, and labor supply. At first war production was frequently piled on top of existing production of consumer goods. The Army and Navy, accustomed to peace-time procurement methods and acting under the administrative policy of "guns *and* butter" enunciated in 1940, simply funneled 1940 and early 1941 contracts into their customary suppliers. Thus the arms and precision instrument industries of Bridgeport and Hartford, the aircraft industry of Southern California, and the automobile industry of Southern Michigan soon found themselves with backlogs of war contracts amounting to several years of normal production. As a matter of fact the increase in the employment and earnings of workers resulted in an increase in the production of consumer goods at the same time that war production was getting under way. A point was reached, however, when there occurred serious competition for available facilities and labor between the production of consumers goods and the production of goods needed for war purposes. There were not enough to meet all demands and critical materials had to be rationed. Thus the price of continued operations for many plants was their conversion to war production. The labor force of the converted plants was frequently transferred to war production without any severance in the employer-employee relationships. Oftentimes these conversions called for ingenious worker and job analyses, coupled with brief but intensive training. The story of the shift of the automobile industry is well known. The Servel refrigerator plant uses its labor in manufacturing airplane frames. Cast iron foundries made idle by curtailment orders are now busy producing aluminum castings, using their old, now retrained, labor. Workers in other plants that could not be converted transferred to plants engaged in war production located within the same community or elsewhere. Thus silk stocking operatives in Philadelphia, after receiving brief training, went to work for the Quartermaster's Depot as sewing machine operators turning out a variety of army wares.

At the same time these developments were taking place, new plants and facilities were being built principally in established industrial communities, usually so that management and skilled labor could be shared by the old and new plants. Gradually, however, new areas were affected and some communities which had been depressed by the cessation of civilian production were turned into "boom" towns almost over night. Evansville, Indiana, passed from a distressed community to a labor shortage area as its plant facilities, such as Briggs Body, Servel and Chrysler, were filled with war work and as new plants, such as the new Republic Aviation plant, were constructed for expanding war production. Stimulated by strategic considerations, together with the incapacity of established industrial communities to accommodate a further expansion, rural and semi-rural areas were chosen as sites for the location of new plants and facilities. The open country was particularly sought for the construction of armament plants and depots, such as those at Huntsville, Alabama, Charles-

town, Indiana, and Ravenna, Ohio. Too, the availability of power, transportation, and other elements of production dictated the location of many plants in places with little local labor, such as Listerhill, Alabama, and Freeport, Texas.

Two sets of forces were operating to affect the allocation of manpower. In one case the existence of both a labor supply and production facilities determined the letting of contracts and the expansion of productive capacity, with the result that the labor was not shifted geographically, except insofar as it is necessary to supplement the local supply by in-migration. In the other case labor supply had to be shifted to new communities to man the plants and facilities which were built in nonindustrial areas.

The allocation of workers among different industries and plants is conditioned by strategic considerations, which in turn are affected by the fortunes of war. Workers should be assigned in accordance with the urgency of the need in the prosecution of the war for the different products being turned out. At one time the need for ships may be more urgent than the need for any other implement of war. The demands of the shipyards for workers in essential occupations may then outrank the demand of any other industry for the same workers. At another time it may be four-motored bombers that have priority over the next most urgent need; at another, tanks, guns, munitions, or other products. To render the problem of allocating manpower more complicated, the different stages of production of the various plants turning out war supplies have to be taken into account. Some plants may be operating at near capacity, while others may be in merely the tooling-up stage. Both plants may be in need of the same workers, say, machinists or toolmakers, of whom there is an insufficient supply. In such cases the assignment of the workers may involve the weighing of the value to the war program of a few additional units of products immediately against the value of a larger potential supply in the future.

In January of this year the Employment Service adopted a policy of referring available workers to war producers in accordance with the importance of their production. For want of a better criterion the material or equipment priority rating of employers was used to classify them in the order in which they would be supplied workers. For this purpose the third symbol of the priority rating was ignored and all employers with a material or equipment rating of A-1 to A-10 were deemed to be engaged in war production. Because the supply of workers available through the Employment Service was inadequate to meet the demands of all A-1 employers, wide latitude was allowed to the local employment offices in deciding which employers were to have such workers as could be recruited in shortage occupations.

In actual practice the effort of the Employment Service to assign workers to war employers in accordance with the importance of their production has not been very effective. Employers are not obliged to use the Employment Service and many important employers continue to use their own devices for recruiting workers. Employers with low ratings have had no incentive to use the Employment Service, since they have not been eligible to obtain workers in shortage occupations in which the

supply has been insufficient to meet the demands of employers with higher ratings. Similarly, in some occupations the workers have been long accustomed to obtaining employment through other channels and never come to the Employment Service to be referred to a job. One result of the Employment Service assigning workers according to the importance of employers in the war program has been to focus greater attention on the existence and character of the labor supply problems.

Recently another approach has been taken in an attempt to solve the problem of redistributing essential skilled and semi-skilled workers. In collaboration with the Selective Service System and through its organization, the Employment Service is taking an occupational inventory of all men registered by the Selective Service System. A questionnaire designed to obtain a record of the occupational training and experience of each individual is being obtained and turned over to the local employment offices. These questionnaires are being classified and each person not now employed in war production, who indicates having had experience in an essential occupation, is called in for interview. If the individual is qualified in an essential occupation, he is given an opportunity to transfer to war production where his services are needed.

The employment offices are attempting to transfer qualified workers to employers in accordance with the relative importance of their production to the war effort. Except for general guidance the local employment offices are obliged to use their own judgment in determining which employers are the most important. The War Manpower Commission, however, has recently requested the War Production Board to rate all establishments in accordance with the position they occupy in the war production program. When these ratings are available they will provide the Employment Service with a more satisfactory guide for the recruitment and allocation of workers.

It must be apparent from the foregoing that we have not yet developed an integrated program of manpower allocation. In absence of any declared policy, the different agencies concerned have wrestled with the problem as best they could. There is no compulsion on anyone to work at any particular job. Many experienced men needed in war production have not yet found their way into essential activities. Many other workers have moved aimlessly from job to job or in response to opportunities to obtain higher wages or to enjoy better working conditions. Similarly employers have been free of control over their employment practices. Competitive advertising and labor scouting have been engaged in extensively. The absence of direct authority to control the actions of either the workers or the employers constitute the crux of the yet unsolved manpower allocation problem. At the moment every possible alternative solution to the manpower problem, short of special labor market controls, is being considered, with full consciousness that such controls would inevitably limit the freedom of action of workers and employers alike.

SOME LEGAL ASPECTS OF WARTIME LABOR MOBILIZATION

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Compulsory manpower mobilization may be described as those forms of governmental control or regulation which are designed to achieve maximum utilization of the manpower of a nation in the armed forces, the production of materials needed for the prosecution of a war and the maintenance of essential civilian needs.[1] A labor mobilization program may begin with the division of the total available manpower between the armed forces and civilian activities.[2] The program may ultimately

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[1] As of this date no direct compulsory measures, statutory or otherwise, have been instituted in the field of labor mobilization. The occupational deferment provisions of the Selective Training and Service Act of 1940, 54 STAT. 885, 50 U. S. C. §301, hereinafter referred to as "The Selective Service Act of 1940," constitute an indirect pressure exerted *sub silentio* on the worker himself. See note 2 *infra*.

[2] Section 5(e)(1) of the Selective Service Act of 1940 authorizes the President by regulation to provide for the deferment of "those men whose employment in industry, agriculture, or other occupations or employment, or whose activity in other endeavors, is found . . . to be necessary to the maintenance of the national health, safety, or interest." Emphasis thus far has been upon the dependency deferment rather than upon the occupational deferment, dependency (Class III) being determined prior to occupational status (Classes II-A and II-B). Selective Serv. Reg. (2d ed.) §623.21. Heretofore, neither the individual's potential usefulness in other than his present employment nor the prospective need for his occupational skills appears to have been a pertinent consideration in applying the occupational deferment, except in the limited field where his current status (as unemployed or engaged in non-essential work) is attributable to a "seasonal or temporary interruption." Selective Serv. Reg. (2d ed.) §622.24; *cf.* Selective Serv. System Release No. 185, Feb. 28, 1941. BUS. & DEFENSE COORDINATOR, p. 6,011. Since all deferments are discretionary with the President and no order of application is prescribed in the law, the emphasis can readily be shifted to enable operation of the statute in a manner more conducive to effective labor mobilization. Public No. 625, 77th Cong., 2d Sess. (June 23, 1942), by providing dependents' allowances to men in military service, may facilitate such a shift. The recent Executive Order establishing the War Manpower Commission which vests broad powers in the Chairman to provide for the effective mobilization and maximum utilization of the nation's manpower, should lead to a more realistic allocation of manpower (on a qualitative basis) between the armed forces and essential civilian activities. Exec. Order No. 9139, April 18, 1942, 7 FED. REG. 2919. War Manpower Commission Directive No. V, to the Director of Selective Service, clearly reflects such an approach. 7 FED. REG. 4749 (1942). A possible obstacle to centrally planned and executed allocation is the seeming autonomy of the local boards of the Selective Service System in deferment determinations. Selective Service Act of 1940, §5(e).

It has been suggested that the pressure potentially exertable upon the individual in the form of threatened induction into military service might become the principal coercive force behind such measures of worker control as may be desired. BARUCH, TAKING THE PROFITS OUT OF WAR (1931) 34;

involve specific directions by the Government to an individual to work at a designated task in a designated enterprise. Between the two extremes lie a multitude of measures and methods which may be applied progressively as the exigencies of current events require.

Since compulsory labor mobilization in our country[3] will probably be progressive in character, this discussion of some of its legal aspects will be based on the progressive steps which may be taken.[4] The alternative approach—to depict full and complete labor mobilization as it might appear in its final stage with a legal analysis of each detail—has been rejected because some of the steps discussed might not appear or might take different form, and because the ensuing conclusions which would then necessarily be based on the relation of each phase to the completed whole, might be misleading.

Effective utilization of the manpower of a nation necessarily entails, with respect to the individual worker, his placement and retention in that employment in which his capacities can be most effectively utilized in the national interest. Insofar as these objectives are accomplished by compulsion contrary to the individual's will, exerted either directly by the Government or indirectly by economic pressures governmentally inspired, certain peacetime rights of the individual are necessarily affected. These include the right to remain idle,[5] the right to seek employment in whatever way desired, the right to choose one's employer and employment, and the right to bargain freely as to the terms of one's employment. These and other rights com-

Note, *Mobilization for Defense* (1940) 54 HARV. L. REV. 278, 292. The limited effectiveness of a "Work or Fight" policy under the Selective Service Act of 1940 is apparent. Among its deficiencies are the non-liability for military service of women and of men in certain age groups, §3(a), the prohibition against deferment by occupational or industrial groups, §5(e), the possible induction or voluntary enlistment in the armed forces of individuals with critical shortage skills required for essential war production, and the implication that service in the armed forces is a penalty for failure to serve more effectively elsewhere. The pertinence of First World War experience and thinking may also be doubted since thus far, at least, current labor shortages have been qualitative rather than quantitative. A "Work or Fight" policy is most effective in securing unskilled or semiskilled labor. Our present major problem involves the most effective utilization of workers possessing critical shortage skills, many of whom are already in war work. Of two individuals with identical employment, dependency and physical status, but differing in that only one possesses a critical shortage skill required for essential war production, it is doubtful whether §5(e) of the Act may be construed and applied to defer the less skilled individual and to induct the specially skilled individual who refuses to work where he is most urgently needed.

[3] For a summary of compulsory labor mobilization in other countries, see Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV. L. REV. 50. For recent important developments in Canadian labor mobilization, see Nat. Selective Serv. Order of March 21, 1942 (P. C. 2250); Stabilization of Employment in Agriculture Regulations, March 21, 1942 (P. C. 2251); Essential Work (Scientific and Technical Personnel) Regulations, 1942, March 4, 1942 (P. C. 638); and Order for Compulsory Registration of Unemployed Male Persons, May 19, 1942. Canada, Emergency Laws, Orders and Reg., pt. 37, pp. 27-41.

[4] "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with the evils which are exhibited in activities within the range of legislative power." NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1, 46 (1937).

[5] As to the right not to work, see 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (1929) §1200; Keefer, *Has a Person a Constitutional Right to Abstain from Work?* (1921) 29 W. Va. L. Q. 20. *Cf. ex parte* Hudgins, 86 W. Va. 526, 103 S. E. 327 (1920); State v. McClure, 105 Atl. 712 (Del. 1919).

monly enjoyed by individuals and frequently considered inviolate by the courts[6] must be restricted in whole or in part if the primary objectives are to be secured.[7]

From the standpoint of the employer, the objectives of labor mobilization are corollaries of the above. The employer must facilitate the employment of the worker in that employment in which his capacities can be best utilized in the national interest and the expenditure in that employment of the worker's utmost effort. The employer likewise must surrender certain rights, for example, the right freely to solicit workers, the right to employ or not to employ, the right to fix the terms and conditions of employment, etc. Likewise, other persons or groups concerned in the relationship such as labor and employer organizations, employment agencies,[8] and even state and local governments[9] may be compelled to surrender rights to the extent that their exercise would interfere with the desired objectives.

The restriction of these rights might be accomplished in several ways. Three possible approaches suggest themselves. Labor mobilization might be accomplished in much the same manner and on the basis of the same principles as military conscription; all workers would be "conscripted"[10] into a force resembling in objective and methods the organization now governing the armed forces of the nation. Inasmuch as the source of military law lies chiefly in historical precedent and in the express constitutional authority in the Congress, not only to raise armies but also to prescribe rules for the government and regulation of the armed forces,[11] this method of achieving compulsory labor mobilization would undoubtedly meet constitutional difficulties. Although certain forms of military service approximate certain forms of service carried on by labor in civilian life, the power to govern and regulate the land and naval forces, in the course of which certain services may be required not of themselves military in character, differs materially from the power to declare war, to support armies and to maintain navies.[12] Neither power may include the power to conscript and to govern, as an army is governed, the working forces of a nation.[13]

[6] *Cf.* Truax v. Raich, 239 U. S. 33 (1915); Coppage v. Kansas, 236 U. S. 1 (1915); Adair v. U. S., 208 U. S. 161 (1908); Allgeyer v. Louisiana, 165 U. S. 578 (1897); 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1341.

[7] Recent decisions of the Supreme Court have stressed the principle that all these so-called rights or liberties are not immune to infringement by Congress or the States in the exercise of constitutional powers. Olsen v. Nebraska, 313 U. S. 236 (1941); NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). Adair v. U. S., 208 U. S. 161 (1908) and Coppage v. Kansas, 236 U. S. 1 (1915) have been "completely sapped * * * of their authority." Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 187 (1941).

[8] *Cf.* Olsen v. Nebraska, 313 U. S. 236 (1941).

[9] *Cf.* Oklahoma v. Atkinson, 313 U. S. 508 (1941); U. S. v. California, 297 U. S. 175 (1936); Wayne County v. U. S., 53 Ct. Cls. 417 (1918), *aff'd*, 252 U. S. 574 (1920). "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield." Florida v. Mellon, 273 U. S. 12, 17 (1927).

[10] The word "conscription" is defined in Webster's New International Dictionary (2d ed.), as "a compulsory enrollment of men for military and naval service." Conscription of labor thus appropriately describes this approach but the term is misleading when used with relation to other forms of labor mobilization not involving control equivalent or analogous to that exercised over the armed forces.

[11] U. S. CONST., Art. 1, §8, cls. 12 and 14.

[12] *Id.* Art. 1, §8, cls. 11, 12 and 13; Selective Draft Law Cases, 245 U. S. 366 (1918).

[13] The conclusion might be different in instances of military government in which the military has

A second possible approach to a compulsory labor mobilization program is direct operation by the Government of all essential war production enterprises.[14] The power of the Government, during war time, to enter fields ordinarily occupied by private enterprise is beyond doubt. Instances during the past and present World War include the Government's operation of railroads,[15] telegraph and telephone facilities,[16] and airplane factories.[17] If the Government replaces the private employer, many of the difficulties presented by the third approach discussed below would be removed. All doubts based on the distinction between services rendered directly for the Government and services rendered for private employers would be laid at rest.[18] Assuming such replacement of private enterprise, the Government's power to accomplish all things necessary in the field of employment relations could not be seriously doubted.[19]

The third approach is that of increasing governmental control over all facets of the employment relationship by means of direct or indirect compulsions upon the various persons involved. It is of importance to recognize that the primary objective of labor mobilization, *i.e.*, the placement of each individual worker in that position in which his capacities can be most efficiently utilized, can be achieved to a large degree by measures short of governmental compulsions operating directly upon the individual worker. If the individual is a wage-earner dependent upon employment for his livelihood—and this category would include the vast majority of potential workers in this country—his employment activities can be controlled to a large extent by controls upon the other party to the employment relationship, *i.e.*, the employer. To the extent that the employment activities of employers are controlled directly or indirectly, corresponding activities on the part of employees are likewise controlled. The direction that is thereby given to the activities of the worker will depend not only upon the degree and nature of the control exercised but also upon the extent to which the controls apply to all employers. Obviously, if governmental control extends to only a portion of all employers in the nation, the worker will to that extent be

superseded a suspended sovereignty. *Cf. Ex parte* Milligan, 4 Wall. 2 (U. S. 1866); 3 WILLOUGHBY, *op. cit. supra* note 5, §1041 *et seq.* Of considerable interest in this connection are the measures of compulsory labor mobilization instituted by the Military Governor under the state of martial law now existing in Hawaii. These include the freezing of wages, regulation of hours on essential projects, and prohibitions against leaving essential employment. Wash. Post, April 5, 1942. For a discussion of the validity of other measures instituted in Hawaii, see Anthony, *Martial Law in Hawaii* (1942) 30 CALIF. L. REV. 371.

[14] "Conscription of industry" has been widely discussed in connection with the "universal draft" principle. For a discussion of its constitutionality if unaccompanied by just compensation, see Cormack, *The Universal Draft and Constitutional Limitations* (1930) 3 So. CALIF. L. REV. 361.

[15] Northern Pac. Ry. v. North Dakota, 250 U. S. 135 (1919).

[16] Dakota Central Tel. Co. v. South Dakota, 250 U. S. 163 (1919).

[17] Occasions during the last and present war where entire enterprises were commandeered or simply "taken over" by the Federal Government are collected and discussed in Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 518. In none of these were any measures of compulsory labor mobilization taken.

[18] See note 65, *infra*.

[19] U. S. CONST., Art. 1, §8, cl. 18; cf. Hamilton v. Ky. Distilleries Co., 251 U. S. 146 (1919); Selective Draft Law Cases, 245 U. S. 366 (1918).

free to pursue his unrestricted employment activities with employers not within the purview of the Government's regulation. Employer control as contrasted with worker control offers for many reasons a more expedient approach to labor mobilization, at least in the early stages. Some of these reasons are discussed below.

The rights of employers in the employment relationship have undoubtedly come to be regarded as less sacred and inviolable than the corresponding rights of employees. In a certain sense, controls upon the exercise of these rights involve restrictions upon the employer's "liberty of contract," as contrasted with the more sacred personal rights of the worker. The employer enjoys the fruits of an individual's labor; the employer's activities are generally associated with the contractual side of the relationship rather than with the actual expenditure of personal service.[20] Control of employers' employment activities has been frequently and widely exercised by both state and federal governments. Many precedents exist which justify such control from a constitutional standpoint. These precedents have arisen not only as a result of the exercise by the states of their police power[21] but also are numerous in connection with the exercise by Congress of its interstate commerce, war, and other powers.[22]

Wartime controls of the owners and producers of scarce materials and facilities are very closely analogous to controls over an employer's hiring and utilization of workers possessing shortage skills required for essential war production. Recent acts of Congress not only operate positively to require employers to fill Government orders or to give preference to orders of certain private persons, but also operate negatively to prohibit the sale or disposition of certain materials and facilities.[23] Controls upon employers, necessary to secure the allocation and distribution of the labor supply essential for the maintenance of necessary civilian and war production activities, may entail much less drastic measures than those now in effect in connection with the allocation and distribution of essential materials and facilities. Another factor entitled to some weight is the fact that the employer's bargaining power is usually more

[20] Opposition raised by employers to laws regulating phases of the employment relationship has been based on liberty or freedom of contract rights. No case has been found in which the employer has interposed any defense analogous to that which the worker might raise under the Thirteenth Amendment or on the ground of deprivation of personal liberty under the Fourteenth or Fifth Amendments. *Cf.* Marcus Brown Holding Co., Inc. v. Feldman, 256 U. S. 170 (1921).

[21] Manner of paying wages: McLean v. Arkansas, 211 U. S. 539 (1909); Knoxville Iron Co. v. Harbison, 183 U. S. 13 (1901). Hours of work: Bunting v. Oregon, 243 U. S. 426 (1917); Muller v. Oregon, 208 U. S. 412 (1908); Holden v. Hardy, 169 U. S. 366 (1898). Contract limiting tort liability: Chicago, B. & O. R. R. v. McGuire, 219 U. S. 549 (1911). Employment of women: Radice v. New York, 264 U. S. 292 (1924). *Cf.* Mo. Pac. Ry. v. Mackey, 127 U. S. 205 (1888).

[22] U. S. v. Darby, 312 U. S. 100 (1941); NLRB v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937); Patterson v. Bark Endora, 190 U. S. 169 (1903). *Cf.* Second Employers' Liability Cases, 223 U. S. 1 (1912).

[23] The statutes and their administration are discussed in Note, *American Economic Mobilization* (1942) 50 HARV. L. REV. 427. See, for example, §2(a) of the Priorities Act, 54 STAT. 676 (1940) as amended, 41 U. S. C. (Supp. I) and §9 of the Selective Service Act of 1940. Under these acts authority has been asserted and exercised to limit, restrict and prohibit certain types of production deemed unnecessary and to regulate the use of certain scarce materials. Note, *American Economic Mobilization, supra,* at 455-465.

potent than that of the worker,[24] with the result that considerable restriction of the employer's usual rights in the employment relationship may be accomplished without raising the worker to a preferred position. Finally, it is noteworthy that if employer controls result in substantial economic losses, such losses can be more effectively compensated by the Government. The employer can usually be made whole by money compensation if the payment of such compensation is necessary or expedient for constitutional or other reasons; deprivation resulting from regulation of the worker's rights in the employment relationship are not so readily compensated.[25]

From an administrative point of view, it is undoubtedly an easier task to regulate, directly or indirectly, employers than it is to enforce compulsory measures upon employees. Because employers are far less numerous than employees, greater coverage is achieved by application of the control to a few and the end to be accomplished entails substantially simpler policing. Again, the employer is usually more susceptible to indirect controls than is the employee; considerable influence upon an employer's hiring and employment practices might be exercised through his government contracts as well as through government controls of the raw materials, supplies and facilities without which the employer cannot continue his business.[26]

Although direct compulsion may be brought upon the employer without simultaneously bringing direct compulsion to bear upon the employee, in a practical sense the reverse is not true. If the role of the employer in the employment relationship is to control and supervise his employees, the manner in which that control and supervision is exercised is of paramount importance in the full utilization of an available labor supply. In fact, control of the employer is the only available means of securing desired results in certain parts of this field. The problems of labor conservation and of labor utilization cannot be met without controls upon the employer's activities in the employment process and relationship.[27]

If compulsory labor mobilization in our country proceeds by progressive steps, the first steps will probably involve the regulation and control of employers to the exclusion of direct controls upon workers. If and when employer controls fail to meet adequately the increasing labor demands of an expanding war economy, worker control will be the next resort. To the extent that the protection of workers and the achievement of the ends of worker control require, direct regulation of workers will entail new and additional restrictions upon the rights of employers.

The ensuing discussion can therefore be conveniently divided into (1) measures of employer control, and (2) measures of worker and employer control.

[24] *Cf.* Holden v. Hardy, 169 U. S. 366, 397 (1898); West Coast Hotel Co. v. Parrish, 300 U. S. 379, 393 (1937).

[25] See note 74, *infra.*

[26] See Note, *American Economic Mobilization* (1940) 50 HARV. L. REV. 427. Threat to requisition or commandeer, assuming the ultimate authority to requisition or commandeer, is not duress. *Cf.* American Smelting Co. v. U. S., 259 U. S. 75 (1922); U. S. v. Tengey, 5 Pet. 115 (U. S. 1831).

[27] See pp. 447 *et seq.*, *infra.*

1. *Measures of Employer Control*

Three measures of employer control which undoubtedly will be given careful consideration when and if legislation in the field of compulsory labor mobilization is deemed necessary, are the following:

(a) Establishment of Labor Priorities and Control of the Hiring Process,
(b) Conservation of Critical Workers and Maximum Utilization of Labor Force,
(c) Displacement of Workers in Non-essential Activities.

(a) *Establishment of Labor Priorities.* Just as on the production side of the war effort, the initial stage in industrial mobilization was the establishment of a system of priorities or preferences whereby scarce raw materials or needed products and facilities were reserved for, and allocated to, essential war industries, so in labor mobilization the initial step will involve an allocation of the available "critical workers" (workers qualified to perform occupations required for essential war production, in which a serious labor shortage exists) to those employers whose need for such workers is most urgent from the standpoint of the national war supply program.[28] While production priorities have long been obligatory by statute, labor priorities as of this date exist only as a policy of the United States Employment Service[29] in referring workers for employment.

[28] Under the priorities and allocation powers in §2(a) of the Priorities Act, *supra* note 23, as recently broadened and clarified by the Second War Powers Act, Pub. L. No. 507, 77th Cong., 2d Sess. (March 27, 1942), federal authorities have for some time regulated the use and procurement of scarce materials and products. See *e.g.*, General Preference Order No. P-7, 6 FED. REG., 2875 (1941) (shipbuilders); General Limit. Order L-2, *id.* 4735 (automobiles); Limitation Order L-7, *id.* 5534 (use of steel refrigerators); Supplementary Order M-1-c, *id.* 2854 (aluminum scrap); General Preference Order M-12, *id.* 4212 (cotton linters); General Metals Order No. 1, *id.* 2239; and General Preference Order M-1-A, *id.* 1599 (aluminum). See Weiner, *Legal and Economic Problems of Civilian Supply* (1942) 9 LAW & CONTEMP. PROB. 122. The recently announced shift in priority procedures to one of following raw materials from their inception to the finished product, may result in the abandonment of some or all of the above illustrated types of control, but their usefulness as analogies for present purposes would not thereby be impaired.

[29] The Wagner-Peyser Act, 48 STAT. 113 (1933), 29 U. S. C. §49, provided for a national system of public employment offices to be operated by the states under a system of grants-in-aid made (roughly) on a 50-50 basis. The various state unemployment insurance laws, enacted subsequently, required that benefits be paid solely through public employment offices. See, *e.g.*, S. C. Unemployment Compensation Law, §3(a), S. C. Laws 1936, Act No. 946, and *cf.* INT. REV. CODE, §1603(a)(1), 49 STAT. 640 (1935), 26 U. S. C. §1603. This necessitated a great expansion in the public employment office system in each state, financed almost entirely by federal grants made to state unemployment insurance agencies under title III of the Social Security Act, 49 STAT. 626 (1935), 42 U. S. C. §502. On January 1, 1942, operation of a national system of public employment offices was undertaken by the Social Security Board pursuant to the President's direction and determination that the national war effort required a single, nationally-directed system of public employment offices. Funds for their administration were made available in the Labor-Federal Security Appropriation Act for the fiscal year ending June 30, 1942, Pub. L. No. 146, 77th Cong., 1st Sess (July 1, 1941). State governments cooperated in establishing the national system by releasing personnel and facilities, used in their respective state offices, to the Social Security Board. The federally-operated system is now known as the "United States Employment Service" and is in the Social Security Board. The Board is under the "supervision and direction" of the Federal Security Administrator, Reorganization Plan No. 1, §201, effective July 1, 1939, 4 FED. REG. 2728, 53 STAT. 1424, 5 U. S. C., §133. Paul V. McNutt, the Federal Security Administrator, is also Chairman of the War Manpower Commission. Exec. Order No. 9139, 7 FED. REG. 2919 (1942).

The United States Employment Service has been filling employers' orders for workers in accordance with a schedule of priorities roughly based on preferences established for the war production program.[30] Of several employers seeking critical shortage workers through the United States Employment Service, preference is given to the order of that employer whose production is most essential to the war effort. To the extent that employers are dependent for their labor supply upon the United States Employment Service, the policies observed by the United States Employment Service in filling employer orders determine the allocations made of available workers. On the other hand, as long as employers retain and exercise the privilege of recruiting workers directly or through employment agencies other than the United States Employment Service, the priorities established by the United States Employment Service are not only ineffective to accomplish the desired result, but employers having low, or no, preference ratings are in practical effect induced not to use the public employment office and to compete with such offices in the open labor market. Uncontrolled competition for critical workers between non-war and war employers impedes the desired shift of such workers from non-war to war production, while uncontrolled competition among war production employers contributes greatly to needless and wasteful labor turnover and labor unrest.

Governmental control of hirings, possibly restricted to occupations required for essential war production in which a shortage of qualified workers exists, is therefore a reasonable initial step in a labor mobilization program. Its twofold purpose being to insure an adequate supply of workers for essential war industry by enforcement of priorities and to prevent labor unrest and consequent labor waste by reducing the inducements to labor turnover, precedents supporting Government-controlled allocation of necessary raw materials, supplies and facilities and for prevention of waste of scarce materials and facilities are clearly in point.[31] That the public has a legitimate interest in hiring activities apart from the exercise of war powers is attested by numerous laws regulating private employment agencies,[32] and by laws, both state and federal, for the creation and maintenance of public employment offices. Such government control may take the form of (1) requiring all hirings for critical occupa-

[30] See War Manpower Commission Directive No. III, to U. S. Employment Service, 7 FED. REG. 4748 (1942).

[31] For the scope of the war power see the famous dicta of Brandeis, J., in U. S. v. McIntosh, 283 U. S. 605, 622 (1931), and Hughes, C. J., in Home Building and Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934). The constitutionality of an allocation system was apparently assumed in Atwater & Co. v. U. S., 275 U. S. 188 (1927) and Omnia Commercial Co. v. U. S., 261 U. S. 502 (1923), and was upheld specifically in Roxford Knitting Mills v. Moore & Tierney, Inc., 265 Fed. 177 (C. C. A. 2d, 1919) *cert. denied*, 253 U. S. 498 (1920). Conservation, and its apposite, prevention of waste, are clearly proper subjects for governmental concern and control, either as measures of facilitating allocation or as measures of allocation itself. See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 463 (1942). Measures for prevention of waste of national or state resources have been upheld independently of the war powers. *Cf.* Champlin Refining Co. v. Corp. Comm. of Oklahoma, 286 U. S. 210 (1932). See note 45 *infra*. No valid distinction can exist insofar as the employer is concerned between the allocation of scarce materials and facilities needed in the war effort and the allocation of scarce labor, the purposes of both measures and their relation to the war effort being identical.

[32] Olsen v. Nebraska, 313 U. S. 236 (1941); Brazee v. Michigan, 241 U. S. 340 (1916); Brandeis, J., dissenting in Adams v. Tanner, 244 U. S. 590, 597 (1917).

tions to be carried on through public employment offices or subject to their control, and (2) regulating or prohibiting all forms of public or private solicitation of critical workers. The prohibition or regulation of solicitation is necessary both to prevent labor waste, and as an incidental measure reasonably appropriate to the enforcement of exclusive hiring controls.[33]

Experience during the current war seems to indicate that national labor shortages develop largely in a few occupations requiring a high degree of skill and a correspondingly long period of experience and training. Government regulation will normally, then, be directed at these occupations. Enabling legislation is not likely to attempt detailed specifications as to the occupations affected. New shortages of skilled workers in critical occupations will develop, and former shortages may disappear from time to time in the normal metamorphosis of the war production program; unforeseeable shifts in emphasis are inevitable in the war supply program, while the demands of the armed forces are unpredictable both as to number and type of men needed. The immobility of labor will give rise to shortages in some areas while in other areas the supply of qualified workers may be adequate or even in excess of local needs. Hence, the likelihood of a general definition of critical occupations and a delegation of authority to an administrative agency to specify the occupations to which, and the localities in which, the controls will be applied.[34]

The control may be directed either at the qualifications of the individual hired, or at the work for which the individual is hired. The first approach appears more direct and if feasible, more effective; it would involve, however, knowledge on the part of the employer of the qualifications of each worker he proposes to hire, facts peculiarly within the knowledge of the worker. Since it would be unreasonable to charge an employer with the truth and accuracy of facts supplied to him by a worker,[35] the first approach would require some predetermination by the Government of each worker's qualifications, and communication of such information to prospective employers. Each worker might be furnished with a card upon which his qualifications (or lack of qualifications) are noted, and each employer thereby charged with knowledge of the qualifications shown on the card, to be produced by the worker as a condition precedent to a hiring.[36]

[33] It is of interest to note that the "regulation" promulgated by the Director of the United States Employment Service during the First World War undertook not only to require that certain enterprises hire only through public employment offices but also to restrict solicitation and advertising for labor. Hoague, Brown & Marcus, *supra* note 3, at 57. Control of advertising marked the first hesitant step in both English and Canadian labor mobilization programs. *Cf.* Control of Employment (Advertisements) Order, 1940, S. R. & O. 1940, No. 522, BURKE, WAR LEGISLATION [Eng.] (1940) 605; Labor Enticement Regulations, Nov. 7, 1940 (P. C. 6280), Canada, Emergency Laws, Orders, and Reg., pt. 37, p. 15. Canada has recently instituted control of hiring. Control of Employment Regulations, 1942, June 12, 1942 (P. C. 5038), *id.* pt. 37, p. 27.

[34] Reasonable delegations of this type are beyond question. *Cf.* Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126 (1941); Sunshine Coal Co. v. Adkins, 310 U. S. 381 (1940).

[35] War does not waive the necessity for due process, one of the requirements of which is the fixing of an ascertainable standard of guilt. U. S. v. Cohen Grocery Co., 255 U. S. 81 (1921).

[36] Obviously such a system would require a card for every potential worker, whether or not qualified in the critical occupations. Otherwise failure to produce a card could be attributed either to concealment by the qualified worker or to an actual lack of qualification. To police the regulation, probably

Assuming controls applicable solely or primarily to employers, the second approach is more feasible. The type of work for which a worker is hired is a fact, knowledge of which is reasonably chargeable to the hiring employer. The only legal objections that an employer might raise to a law imposing penal sanctions for his failure to hire persons for specified critical occupations in accordance with prescribed methods, would be that the restricted occupations were not susceptible of definition with sufficient precision to charge him with notice that the particular job for which he hired a worker fell within the prohibited class. The occupations likely to be so restricted are generally susceptible of descriptions sufficiently precise to meet any such objection;[37] such an objection loses all force if the employer is afforded adequate opportunity to obtain clarification from an administrative agency such as the public employment offices, or may protect himself by hiring exclusively in accordance with the methods prescribed for the restricted occupations, or both.

(b) *Conservation of Critical Workers and Maximum Utilization of Skills.* Establishment and enforcement of labor priorities, with control of hiring as the *modus operandi,* leaves the currently employed largely untouched. But just as in the production field the exigencies of modern war have necessitated governmental control of inventories and surplus stocks of scarce materials,[38] so in the labor field it is improbable that employers would long be left entirely to their own devices in their utilization, or waste, of the skills of their current labor force. Government has already interested itself in the manner in which employers utilize workers in their employ. Much has been accomplished on a voluntary basis; particularly in cases in which Government and employer interests coincide, voluntary cooperation may be expected to continue to play a leading role.[39] But as new shortages develop and old shortages become more critical, hoarding or wasteful utilization of workers possessing critical skills by uncooperative employers will become intolerable and direct controls in this field may be expected.

The term labor conservation, when used with reference to critical workers, embraces, positively, the employment of a critical worker exclusively at operations fully utilizing his special skill, and negatively the release of a critical worker from employment in which his skill is not, or cannot be, fully utilized. A critical worker may be employed to perform tasks, none of which involve an exercise of his special skill;

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the card would have to be retained by the employer while the worker was in his employ. So long as there is no general labor shortage and critical occupations remain relatively few, the labeling of every worker and the consequent inconvenience to those with whose employment the Government is not concerned, would hardly be justified. Innocent loss of a card or its unjustified retention by an employer may cause hardship to a worker thereby precluded from employment until the lost card is replaced or returned to him. Analogous "leaving certificates" caused such a furor in England during the last war as to lead to their abandonment in October, 1917. Hoague, Brown, and Marcus, *Wartime Conscription and Control of Labor* (1940) 54 HARV L. REV. 50, 68.

[37] An ambitious effort to catalogue and define occupations resulted in the "Dictionary of Occupational Titles" (1939), prepared by the U. S. Employment Service when a bureau in the Department of Labor. It is available to public purchasers through the Government Printing Office.

[38] See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 455 *et seq.*

[39] See BUSINESS & DEFENSE COORDINATOR, *Fighting Labor Scarcity,* C-3, 701 *et seq.*

labor conservation in such a case would either require that the worker be released or employed at an operation or operations in which his skill will be fully utilized. A critical worker may be employed partly at operations involving an exercise of his special skill and partly at other severable operations; labor conservation in such a case would require that the operations be segregated (a process known as "job simplification") and the critical worker employed exclusively at operations which require the exercise of his special skill. If an employer is unable or unwilling to offer a critical worker full-time employment at operations involving exclusively the exercise of his special skills, labor conservation may require that the worker be released and made available to other employers who can and will afford such full-time employment.

Obviously, labor waste is not peculiar to employers engaged in war production; it may occur wherever critical workers are employed. Controls in this field may therefore apply to all employers alike, the line being drawn not on the basis of the occupations or operations in which an employer utilizes a worker, but on the basis of the qualifications of the workers he employs. Labor waste may be committed by an employer quite unknowingly, while measures of labor conservation, involving a high degree of technical knowledge both of machines and men, may be beyond the employer's ability to conceive and initiate. Government controls in this field may therefore be applied through directives or orders issued to the particular employer, setting forth in reasonable detail the respects in which the employer is wasting critical labor. If the employer can offer no work at which the skill of the critical worker could be fully utilized, his release may be ordered. If, on the other hand, the employer's activities include operations at which a critical worker could be fully utilized, the employer would presumably be given the choice of fully utilizing the worker's skill, or of releasing the worker.

Closely akin to conservation of critical workers and in many instances inseparable in actual practice from it, is the problem of maximum utilization of an employer's available labor force. Maximum utilization includes not only the full utilization of critical workers, but also the utilization of semi-skilled or unskilled workers in the performance of work for which critical workers would be preferred if available.

The interest of Government in the maximum utilization of critical and non-critical workers differs substantially from its interests in the conservation of critical labor. Its interests in the latter arise primarily out of the shortage of critical workers and the necessity that as many as possible be made available for war production; the employer's choice is either to utilize fully or to release the worker. The Government's interest in the maximum utilization of all workers arises out of, and is coextensive with its interest in, the continued production, notwithstanding labor shortages, of business enterprises. The Government is vitally and legitimately interested in maximum production by private enterprises producing materials or providing facilities required in the prosecution of the war. Its interest in the continuation of private enterprises not engaged in war production is not so apparent. In either case,

shortages of critical workers may result in the dependence of an enterprise upon the effectiveness with which management practices conservation in its use of critical labor and utilizes the services of non-critical workers to perform tasks for which only non-critical workers are available.

The Government's interest in the continued welfare of private enterprises, whether or not engaged in war production, is sufficient to warrant an exercise of its spending power to lend reasonable technical aid where requested and needed. Maximum production by private enterprises engaged in war production is of sufficient public concern to warrant such control of management as may be required to insure against avoidable stoppage or impairment of production levels. Whether the interest of the Government in the continuance of non-essential private enterprises warrants compulsory measures against the will of the enterprise itself is doubtful. The problem becomes largely academic in view of the fact that in this field public and private interests largely coincide, and the fact that the limited number of persons technically qualified for such work will require that their full attention be devoted to enterprises engaged in essential war production. The difficulty of differentiating in a statute between employers engaged in essential war production and those not so engaged, may justify a failure to make the distinction in the enabling act.[40]

The principal available measures to effectuate labor conservation and prevent labor waste are job simplification, discharge and upgrading. Corresponding measures to promote maximum utilization of an existing labor force are job simplification, upgrading and training. Discharge of unutilized workers requires no explanation. Its direct relation to labor conservation is apparent since retention by an employer of a critical worker whose skills the employer cannot or will not utilize constitutes the extreme example of labor waste. The impact of this measure upon the employer, though drastic, is simple and direct. The employer has no absolute right to the worker's services and the worker has no absolute right to continue in the employer's employ; though the broken employment contract may have been most valuable to both and the resulting losses severe, since the Government has asserted no right under the contract of employment, no infringement of rights guaranteed by the Fifth Amendment is involved.[41]

[40] See note 59 *infra*. If the enforcement is by directives or orders, an employer engaged in war production against whom the Government seeks to enforce the statute would not be heard to complain on the grounds that the statute as applied to others might be unconstitutional. 1 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 19; 1 COOLEY, *Constitutional Limitations* (8th ed.) 399.

[41] *Cf.* Omnia Commercial Co., Inc. v. U. S., 261 U. S. 502 (1923), in which the Court said that "the essence of every executory contract is the obligation which the law imposes upon the parties to perform it," and that a governmental requisition of the entire product of a steel plant did not purport to be, or effect, a taking of a contract under which the steel company had contracted to deliver steel to a third person, nor a taking of the third party's right to demand performance, but merely operated to end the contract. *Id.* 510. Cited with approval was Marshall v. Glanvill, [1917] 2 K. B. 87, to the effect that a contract of employment is made on the assumption that performance will continue to be lawful and that the contract comes to an end when the rendition and acceptance of the services becomes unlawful. *Id.* 511. Upon similar reasoning the worker would be without remedy. Highland v. Russell Car & Snow Plow Co., 279 U. S. 253 (1929). *Cf.* Duckett & Co. v. U. S., 266 U. S. 149 (1924), and Int. Paper Co. v. U. S., 282 U. S. 399 (1931), involving, respectively, leasehold and water rights which were themselves the subject of a requisition.

Job simplification involves the breaking down or segregation of a complex operation previously performed by one worker of high skill into several operations, one or more of which is capable of being performed by workers of lesser skill. Its pertinence both to labor conservation and to maximum utilization is apparent; in the process a critical worker is released from operations not requiring the full exercise of his skill, while at the same time all or part of a complex operation is performed by non-critical workers, an adequate supply of whom presumedly exists. Job simplification is a technical and complex process requiring expert knowledge, a process well within the traditional province of management. Such being its nature, controversy is inevitable not only as to the need for job simplification in a particular case, but also as to the method of its accomplishment.

Upgrading involves the employment of a worker in that operation in which his skill can be most effectively utilized, the choice of operations being based largely upon the available supply of labor. This measure is inextricably bound up with job simplification and training, the former decreasing the degree of skill required and the latter making possible the acquisition of such skill as is required. In its legal aspects, upgrading differs little from job simplification.

Training in a limited form is properly a measure of maximum utilization; it constitutes a labor conservation measure only if failure to develop *potential* skills constitutes a form of labor waste. As used in this discussion, the term "training" includes all training and instruction afforded by an employer as an incident to the full utilization of his workers for his own needs. If incidental to upgrading, training must be justified as a proper subject of Government regulation and control upon the same theory as upgrading is justified, and presumedly would have the same legal implications. Training provided by an employer in order to meet the needs of other employers, or to increase the general labor supply, is not within the purview of a maximum utilization program. If the purpose and nature of a training program bears no relation to the increased efficiency or production of the employer required to provide particular training, such training would probably be required under principles analogous to those of eminent domain,[42] and appropriate compensation provided.

Assuming that the need for governmental intervention can be demonstrated and that the method of its exercise is reasonable, little doubt exists that the war powers of Congress authorize the measures of control over private enterprise contemplated in labor conservation and maximum utilization programs.[43] Labor conservation in the

[42] That the power of eminent domain extends to a taking which in its immediate result benefits another person, has often been recognized. A use is no less a public use because private persons are the immediate beneficiaries. This, of course, is as true in the case of eminent domain as in the case of the police power. Strickley v. Highland Bay Mining Co., 200 U. S. 527 (1906); Clark v. Nash, 198 U. S. 361 (1905). *Cf.* Miller v. Schoene, 276 U. S. 272 (1928). Compulsory training of workers either for the labor needs of a particular employer (other than the training employer) or for the general betterment of the labor market would probably constitute a taking for a public use and as such require just compensation under the Fifth Amendment. *Cf.* Pennsylvania Coal Co. v. Mahon, 260 U. S. 393 (1922).

[43] "But there can be no doubt that upon proper occasion and by appropriate measures the State

sense here used has precedents in measures taken during the preceding and the current war for the conservation of scarce materials, facilities and commodities essential to the war effort; wartime conservation in other fields has been obscured by indirection of method, but similarity in purpose exists notwithstanding the dissimilarity of approach.[44] Waste itself has long been a matter of public concern and a proper subject of Government control. Waste in itself, however innocent, may constitute an evil which is subject to Government prohibition.[45]

In considering the validity of compulsory measures designed to insure maximum utilization of a labor force, the most difficult case is presented if no reliance is placed upon the respects in which maximum utilization aids in the prevention of labor waste or upon the principles citable in support of waste prevention. Assuming that waste of *potential* skills is a proper subject of governmental restraint, the appropriate remedy for waste, *i.e.*, release of the potentially skilled worker, would not promote the objectives of maximum utilization. The primary object of the Government in a maximum utilization program is not to prevent labor waste as an end in itself but to insure the continued and maximum productivity of a particular plant or enterprise, notwithstanding a labor shortage.

It is assumed that compulsory measures to effect maximum utilization of a labor force will in practice be the Government's last resort, taken only after all measures to secure voluntary cooperation have been exhausted and only when the emergency is great. The validity of such compulsory measures may therefore be considered as applied to a recalcitrant employer whose continued and maximum production is vitally necessary to the supply of the armed forces or the maintenance of essential civilian needs. Unless such employer fully utilizes his present labor force, prevailing scarcities of critical workers are such that his essential production must either be seriously curtailed or maintained by sacrificing the essential production of other

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may regulate a business in any of its aspects." Nebbia v. New York, 291 U. S. 502, 537 (1934). If this principle applies to regulations under the police power under the Fourteenth Amendment, the Fifth Amendment cannot impose a greater limitation on the war powers of Congress. Hamilton v. Kentucky Distilleries, 251 U. S. 146 (1919).

[44] That one of the primary purposes of the Lever Act of the First World War, 40 STAT. 277 (1917), was to prevent waste and hoarding was acknowledged in several Supreme Court cases without question as to the legitimacy of the purpose. See, *e.g.*, Highland v. Russell Car and Snow Plow Co., 279 U. S. 253, 259 (1929); and see U. S. v. Penn. Central Coal Co., 256 Fed. 703, 705 (D. Pa. 1918), in which the court said "when a state of war exists, the whole nation is pledged to its successful prosecution. Its resources must be controlled and preserved, that large armies may be maintained in the field." Prevention of hoarding is mentioned as one of the purposes of the Emergency Price Control Act of 1942, Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942).

[45] That the state has a legitimate interest in conserving its natural resources which it can protect by regulatory and prohibitory laws is strikingly illustrated by statutes directed at conserving oil and natural gas. Not only have purely wasteful measures of production been prevented, Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900), but the use of natural gas for certain nonessential purposes has been prohibited. Wells v. Midland Carbon Co., 254 U. S. 300 (1920); Henderson Co. v. Thompson, 300 U. S. 258 (1937); see Ely, *The Conservation of Oil* (1938) 51 HARV. L. REV. 1209; Moses, *Constitutional, Legislative and Judicial Growth of Oil and Gas Conservation* (1941) 13 MISS. L. J. 353. A similar public interest in the conservation of its manpower was recognized in Mountain Timber Co. v. Washington, 243 U. S. 219 (1917). *Cf.* Barbier v. Connolly, 113 U. S. 27 (1885). In time of war a nation's manpower is undoubtedly its most precious and most limited natural resource.

employers from whom critical labor will be diverted. The public interest in such an employer's enterprise far transcends the public interest asserted during peacetime in public utilities or in other forms of private enterprise subjected to equally drastic measures of control.[46] The interest of Government in the continued and maximum production of essential war industries is beyond dispute; it is a legitimate interest and one which the Government may and does ofttimes subserve by itself undertaking the performance of the same functions. The need for Government interference to insure continued production will presumedly be demonstrable factually in terms of the existence of a labor shortage, of the effect of that shortage upon the maintenance of the employer's production levels and of the importance of continued production to the continued existence of the sovereign itself. The controls involved will be regulations of the employer's use of his labor force. The utilization of one's labor force is not more sacrosanct than the price one may demand for his product, the wages he pays his workers, or any of the innumerable incidents to the use of property and labor which have been held subject to the police power of the states, or analogous powers of the Federal Government.[47]

The employer will, of course, not be required to continue his business; he may abandon it at any time.[48] But so long as he continues to produce materials or provide

[46] Consider, for example, the businesses "affected with a public interest," applying the quoted phrase in the sense used in Olsen v. Nebraska, 313 U. S. 236 (1941), rather than Ribnic v. McBride, 277 U. S. 350 (1928). While the analogy to public utilities is helpful as indicating the legitimacy of governmental concern in, and control of, war production enterprises, reservation must be made as to the incidents of that control; thus assurance of a "fair return" would not seem necessary. See note 48 *infra*. It is interesting to note that oil and gas conservation measures have been accomplished without dependence upon the public utility concept. *Cf.* Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235 (1929).

[47] Any attack would probably be based on the due process clause of the Fifth Amendment. But the test of due process is reasonableness of relation to the end sought to be achieved. The controls would be unconstitutional under the Fifth Amendment "only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Nebbia v. New York, 291 U. S. 502, 539 (1934). The war powers of Congress, like the interstate commerce power, are at least equivalent to the police power of the states. Hamilton v. Kentucky Distilleries Co., 251 U. S. 146 (1919); U. S. v. Rock Royal Cooperative Co., 307 U. S. 533 (1939). As to the extent of the war powers, see Miller v. U. S., 11 Wall. 493 (1871); *Ex parte* Milligan, 4 Wall. 2 (U. S. 1866); Northern Pac. Ry. v. North Dakota, 250 U. S. 135 (1919). So tremendous is the war power that the test for due process may be not the presence of reasonableness but the absence of arbitrariness; the criterion expressed in Hamilton v. Kentucky Distilleries Co., *supra*, at 163, was that "its action, unless purely arbitrary, must be accepted and given full effect by the Courts." *Cf.* U. S. v. Chemical Foundation, 272 U. S. 1 (1926); Schenck v. U. S., 249 U. S. 47 (1919); see U. S. v. MacIntosh, 283 U. S. 605, 622 (1931); Home Building & Loan Ass'n v. Blaisdell, 209 U. S. 398, 426 (1934). A discussion of the war powers is contained in *Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990, Price Control Bill*, 77th Cong., 1st Sess. (1941), pt. 1, 63 *et seq.*

[48] On this basis the public utility cases may be distinguished to the extent that their regulation may depend upon the power of eminent domain and be subject to the rule of fair return. Smyth v. Ames, 169 U. S. 466 (1898). The "privilege" of discontinuing one's business has often been relied on as an answer to the contention that one is deprived of property without due process if not assured a fair return under governmental regulations and control. *Cf.* Munn v. Illinois, 94 U. S. 113 (1876); Du Pont de Nemours & Co. v. Hughes, 50 F. (2d) 821 (C. C. A. 3d, 1931). Even as respects public utility cases the rule of fair return does not justify unreasonable rates notwithstanding such rates being the only alternative. Public Service Comm'n v. Great Northern Utilities Co., 289 U. S. 130 (1933). The right to go out of business may be circumscribed by governmental regulation in time of emergency. "The power to

facilities, in the continued production of which the public has a legitimate interest, he will be required to comply with whatever reasonable regulation the Government finds necessary to protect its interest. Any losses which occur by reason of his compliance with such regulation, being losses attributable to a regulation of use required in the public interest rather than a direct appropriation, will not constitute a "taking" of private property within the meaning of the Fifth Amendment, requiring just compensation.[49] Indeed, since the public interest and the employer's own interest largely coincide, it would be difficult if not impossible to ascribe the costs of protecting the interest to anyone other than the employer.[50]

(c) *Displacement of Critical Workers from Nonessential Work.* Assuming a progressive tightening of the labor market due to the rapid expansion of the war production program and the simultaneous withdrawal for the armed forces of many would-be workers, it is not unlikely that the measures discussed above will prove insufficient to meet the labor needs of essential war industries. Circumstances may be such as to warrant compulsory discharge of workers from nonessential enterprises, unaccompanied by the compulsory transfer of the displaced worker to essential war industry. Such compulsion would operate exclusively upon the employer, the subsequent employment or unemployment of the worker being left to the worker himself, except insofar as employer controls, such as control of hiring processes, will restrict the worker's choice of positions and in all probability lead to his employment where most urgently needed in the war effort.

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go out of business when it exists, is an illusory answer to gas companies and water works, but one need not stop at that. The regulation is put and justified as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Block v. Hirsh, 256 U. S. 135, 157 (1921).

[49] Whether the type of legislation here considered would violate the "just compensation" provision in the Fifth Amendment, would depend upon whether there is a "taking" of private property. That clause is described in the *Legal Tender Cases*, 12 Wall. 457, 551 (U. S. 1871), "as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." See *Hearings, supra* note 47, at 302 *et seq.* Thus price fixing and allocation during the last World War, when unaccompanied by an actual requisition of the product, the price and disposition of which were minutely regulated, were held not to constitute a "taking" within the Fifth Amendment. Morrisdale Coal Co. v. U. S., 259 U. S. 188 (1922); American Smelting Co. v. U. S., 259 U. S. 74 (1922); Omnia Commercial Co., Inc. v. U. S., 261 U. S. 502 (1923); Du Pont de Nemours & Co. v. Hughes, 50 F. (2d) 821 (C. C. A. 3d, 1931). The dictum tending to the contrary in Matthew Addy Co. v. U. S., 264 U. S. 239, 245 (1924), has not crystallized into law. Regulation of the use of labor, including compulsory training, may increase the cost of doing business; as such it is more analogous to minimum price fixing than to maximum price fixing. *Cf.* Hegeman Farms Corp. v. Baldwin, 293 U. S. 163 (1934). More exact analogies are found in wage and hour laws, and laws governing labor relations, workmen's compensation and unemployment insurance. All of these laws increased the costs of doing business, but none provided for compensation or assured a fair return, U. S. v. Darby, 312 U. S. 100 (1941); Mountain Lumber Co. v. Washington, 243 U. S. 219 (1917); NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937).

[50] Incidental hardship in particular cases does not suffice to render an otherwise reasonable regulation unconstitutional. N. Y. Rapid Transit Corp. v. City of New York, 303 U. S. 573 (1938); Bayside Fish Co. v. Gentry, 297 U. S. 422 (1936). And the fact that the loss due to the regulation might be such as to put marginal competitors out of business does not of itself indicate unreasonableness. Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 100 (1941); Hegeman Farms Corp. v. Baldwin, 293 U. S. 163 (1934).

Such restriction or prohibition upon an employer's right to enjoy the benefits of an existing employment relationship has a direct analogy in wartime restriction on the use of property and facilities required for the war effort. The employer's right to the continued employment of a worker is at best equivalent to the right of a party to an executory contract to demand performance; the Thirteenth Amendment would preclude the assertion of a greater right.[51] As such, the employer's interests are no less immune to governmental deprivation than is the right of a contractor to performance of a contract, performance of which is prohibited or rendered impossible by the Government. There would, of course, be no occasion for compensation under the Fifth Amendment.[52]

The validity of such enabling legislation is largely dependent upon the manner in which the governmental control is to be exercised. Compulsory measures of this character are peculiarly susceptible to abuse, in that application of the controls may result in unfair discrimination between employers of critical workers. While the indirectness of the fundamental method is not in itself objectionable, the dissimilarity between the end (i.e., to meet the labor needs of war industries) and the method (i.e., to require non-essential employers to discharge critical workers), renders it difficult to arrive at a *modus operandi* that will adequately subserve the purpose while fully protecting employers against arbitrary and unreasonable discrimination. The legislator's problem is further complicated by the fact that under these as well as other measures discussed, the worker himself must be protected—a fact that sharply differentiates this type of action from its counterpart in the control of materials and facilities.

A possible approach is the classification of business enterprises normally employing critical workers in the order of their contribution to the war effort, employers employing critical workers in enterprises at the bottom of the list being subject to first call for the release of all or a certain proportion of their critical workers as the needs of the war production program require. The classification of business enterprises, the determination of the type and number of workers required for war production purposes, the designation of the enterprises which must release workers, and the determination of the number or proportion which each must release, in order to make available the number of workers required for war production purposes,

[51] Clyatt v. U. S., 197 U. S. 207 (1905).

[52] Continued employment of certain critical workers under the circumstances here considered has become detrimental to the public interest. That which may be regulated may be prohibited altogether, if prohibition is reasonably necessary to effect the legitimate ends of Government. Powell v. Pennsylvania, 127 U. S. 678 (1888). No taking of property under the Fifth Amendment is involved since the effect of the prohibition is to end the contract of employment, not to appropriate it. *Cf.* Omnia Commercial Co. v. U. S., 261 U. S. 502 (1923); Hamilton v. Kentucky Distilleries, 251 U. S. 146 (1919); and cases cited in note 49 *supra*. Perhaps the closest analogies in the field of priority and allocation control are found in the General Limitation Orders of the OPM and WPB which prohibit the production of certain nonessential articles requiring needed raw materials and facilities or prohibit the use of scarce materials in the production of such articles. See Weiner, *Legal and Economic Problems of Civilian Supply* (1942) 9 LAW & CONTEMP. PROB., 122, 132 *et seq.* The indirection of this type of order is of special interest in this connection. Damage to the worker would be incidental and within the rule of the *Legal Tender Cases*, 12 Wall. 457, 551 (U. S. 1870).

would be left to the administrative agency. Refinements reasonably related to the purposes, such as designation by locality rather than nationally, and special dispensation for hardships either to employers or workers, or both, would not present legal obstacles.[53] Objections based on the unreasonableness or arbitrariness of the classification would not be applicable under such an approach, and helpful analogies are available in other forms of wartime Government controls.[54]

Under any approach the selection, as between two or more employers in substantially the same circumstances so far as their need for their critical workers and their lack of relation to the war effort is concerned, could reasonably be made on the basis of the likelihood of placing the displaced workers in war industry, including such considerations as the willingness and availability of the worker himself. The standards to govern the selection of workers to be displaced under this type of measure will entail greater difficulties than any measure heretofore considered, but if the standards selected are consistent with the purpose to be subserved and are sufficiently precise to insure against unreasonable and discriminatory treatment of employers and workers, no valid legal objection could be made.[55]

2. *Measures of Worker and Employer Control*

The measures thus far discussed have involved exclusively controls or regulations applicable solely to employers.[56] Control or regulation of the other party to the employment relationship, the worker, is logically the next step. Up to this point, it has been assumed that measures of employer control will be tried before the Government embarks upon the next step. However, it is equally possible that measures of worker control will be instituted simultaneously. In view of the difficulty of differentiating between the interests of one worker and the interests of another and between the types of worker interests involved in the usual employment relationship,[57] it is also

[53] "A dispensing power is a legitimate method of tempering the rigor of the law." FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 133.

[54] The "Work or Fight" order of the Provost Marshal General in the First World War followed this approach, specifying certain occupations (*i.e.*, the "service" occupations) as nonproductive, and rendering all men so engaged liable for immediate induction regardless of dependency status. SECOND REP. OF PROVOST MARSHAL GENERAL (1918). A similar approach occurs in the General Limitation Orders (L orders) and Material Orders (M orders) of the present WPB, the production of certain articles or the use of certain scarce materials in their production being restricted or prohibited. See note 28, *supra*.

[55] Compare the standard for allocation of shortage materials and facilities in §2(a) of the Priorities Act, as most recently amended by the Second War Powers Act. Pub. L. No. 507, 77th Cong., 2d Sess. (March 27, 1942), *i.e.*, "as he [the President] shall deem necessary or appropriate in the public interest and to promote the national defense."

[56] The measures of employer-control discussed previously could be fortified by applying penalties for their enforcement against workers as well as employers Since the worker's and the employer's rights would in each instance be correlative, restraints upon the worker's rights would have the same legal aspects as restraints upon the corresponding rights of the employer. For this reason, and because imposition of penalties upon the worker as well as the employer would deprive the measure of most of the administrative advantages of employer, as contrasted with worker, controls, they require little discussion. Nevertheless, Canada has thus far consistently followed this approach. See note 3 *supra*, and notes 57 and 60 *infra*.

[57] Any such differentiation must necessarily be arbitrary. Canada, for example, has recently taken steps to prevent persons presently engaged in agriculture from securing other than farm employment.

probable that the measures discussed separately below, would be instituted simultaneously.

(a) *Freezing in employment.* Freezing in employment involves restriction of the right of a worker to leave his employment. The purpose of such a measure is to preserve for certain essential production its current labor supply and to prevent the labor waste incident to uncontrolled labor turnover. Consistently with that purpose, the measure would presumedly be applied only to critical workers, conservation of whose labor is a legitimate concern of the Government. Whether the public interest would reasonably extend to the prevention of labor waste incident to the turnover of critical workers not engaged in essential war production, is a matter not free from doubt. The distinction between the Government's interest in this form of waste and its interest in waste of critical workers due to employer nonutilization is apparent; its interest in the latter is in the placement and full utilization of the workers in war production enterprises. If universal freezing is instituted, its strongest justification is the administrative one; it may be impossible to devise a workable procedure or a sufficiently precise standard by which employers and workers could ascertain or be informed whether or not they are engaged in activities deemed essential to the war effort; if that administrative difficulty is real and demonstrable, precedent exists for reliance upon it.[58]

Since no essential legal difference exists between compelling a worker to remain in a particular employment with a private employer, and compelling an individual to accept a particular employment with a private employer, the constitutional issues involved in both measures will be discussed later. Upon principles already discussed in connection with measures of employer control, the public interest in the labor of critical workers is sufficient to justify all otherwise constitutional measures reasonably related to eliminating the waste of such labor caused by turnover. That labor turnover directly results in appreciable labor waste, and that freezing critical workers will curtail labor turnover, requires no demonstration.

A freezing program entails governmental control not only of a worker's right to leave his employment but also of an employer's right to discharge the worker. The unrestricted exercise of either right results in labor turnover. The right of an em-

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Persons whose freedom of employment is thus restricted are those who were employed at farm work on a certain date, *i.e.*, the effective date of the regulation. Obviously, mere happenstance distinguishes farm laborers who are and who are not affected by the regulations, and, while the distinction is perfectly reasonable in the light of the broad purposes to be subserved, it is essentially arbitrary as respects each individual concerned. The Stabilization of Employment in Agriculture Regulations (P. C. 2251), Canada, Emergency Laws, Orders and Reg., pt. 37, p. 31. Simultaneous imposition of a more drastic form of worker-control such as compulsory transfers, discussed, *infra*, p. 457, would have permitted a more reasonable classification, *i.e.*, one based on their qualifications or experience as farm workers, and would have relieved the regulations of the arbitrariness inherent in its dependence on what is essentially an irrelevant factor—the engagement at farm work on a particular date.

[58] *Cf.* Bayside Fisch Co. v. Gentry, 297 U. S. 422 (1936); Jacob Ruppert v. Caffey, 251 U. S. 264 (1920); Purity Extract Co. v. Lynch, 226 U. S. 192 (1912); Dreyfoos v. Edwards, 284 Fed. 596 (S. D. N. Y. 1919), *aff'd*, 251 U. S. 146 (1919).

ployer to discharge a worker is no less subject to regulation and control in the public interest than is his right to hire or to fix the terms of employment.[59]

It should be noted that the right of a worker to quit and the corresponding right of an employer to discharge constitute primary factors in the shaping of their employment relationship. Simultaneous deprivation of the right to quit and the right to discharge in effect leaves the relationship without a rudder. Some Government control of the terms and conditions of employment, in a manner fair to both parties, is not only justified but necessary under the due process clause. It may therefore be expected that if freezing measures are adopted, such measures will be accompanied by incidental measures providing for governmental supervision of hours, wages, working conditions, disciplinary action and the like, or at least for supervision of certain changes therein.[60]

(b) *Compulsory Transfer.* Under a compulsory transfer program, individuals are required to accept employment with a particular employer and the designated employer is required to employ the individual. Such a program necessarily entails freezing, i.e., restrictions upon the rights of both employer and worker to terminate the resulting employment.

Obviously and immediately presented is the question of the validity of such measures under the Thirteenth Amendment.[61] Admittedly, such measures involve a novel form of compulsory service.[62] Yet, assuming a national emergency which

[59] Compare restrictions upon employers with respect to the hiring, tenure of employment, and discharge of workers, prescribed in the National Labor Relations Act, 49 STAT. 452 (1935), 29 U. S. C. §158 (3), (4). Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941).

[60] The order of the Canadian Privy Council promulgating "The Stabilization of Employment in Agriculture Regulations, 1942," effective March 23, 1942, *supra* note 57, in effect constitutes a freezing measure. These regulations seek to accomplish "freezing" indirectly by restraining workers in agriculture on the effective date of the order from obtaining employment elsewhere, and at the same time restraining prospective nonagricultural employers from hiring such a worker. The regulations do not restrict the employer's right to discharge an agricultural worker, nor the latter's right to quit a particular agricultural employer. A somewhat similar technique is followed in other orders of the Canadian Privy Council which forbid the entry into employment in specified nonessential activities (called "restricted occupations") of certain male persons, Order of March 21, 1942, and require employers to release critical workers requested by the Minister of Labour to transfer to essential work. See note 3, *supra.*

[61] U. S. CONST., Amend. XIII, provides in part: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[62] There are many early English statutes the object of which "was partly the suppression of vagrancy, but it was also generally considered a proper function of the police power to secure, if necessary, by compulsory measures, to agriculture and industry an adequate and steady supply of labor." FREUND, POLICE POWER, §448, *cf.* §408. This author continues: "At the present day it is only necessary to refer to this kind of labor legislation in order to point out its unconstitutionality. The requirement would beyond any doubt be involuntary servitude forbidden by the Thirteenth Amendment of the Federal Constitution, and a statutory minimum term for labor contracts is an indirect form of compulsory service." England now has wartime statutes, regulations and orders which far eclipse the earlier statutes in their controls of workers and employers, *e.g.*, Emergency Powers (Defense) Act (1940) 3 & 4 GEO. VI, c. 20; 5 & 6 GEO. VI, c. 4 (1941); Defense Regulations 54 (1940) (controlled undertakings) and 58 A (1940) (control of employment); The Essential Work (General Provisions) Order, 1941, S. R. 60, 1941, No. 302. See Hoague, Brown, and Marcus, *supra* note 3, at 69 *et seq.*

Clearly distinguishable are some of the so-called Counsel of Defense statutes enacted by several states during the First World War requiring persons to be gainfully employed, the restraint being

warrants such measures, in only one material respect have the forms of compulsory service heretofore sanctioned under the Thirteenth Amendment differed from the compulsory service now under consideration, to-wit, all found precedent in our own or pertinent English history.[63] The lack of historical precedent for the measures here considered can be readily explained by the novelty of the circumstances which may confront the nation; while such precedent would be useful, its absence *per se* should not constitute a constitutional obstacle.[64]

Underlying every type of compulsory servitude heretofore upheld is the fundamental element, often described as the justifying element, that the servitude was in the public interest.[65] Underlying every type of compulsory servitude held prohibited

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against idleness rather than upon the individual's choice of employment. The statutes are collected in Hoague, Brown, and Marcus, *supra* note 3, at 60. One of these, W. Va. Acts 1917, 2d Ex. Sess., c. 12, was held unconstitutional in *Ex parte* Hudgins, 86 W. Va. 526, 103 S. E. 327 (1920), principally on the grounds that it was not the vagrancy law it purported to be because it was not conditioned on financial distress, and that the state had no war powers. The latter argument seems unsound. Gilbert v. Minnesota, 254 U. S. 325 (1920); State v. McClure, 7 Boyce 265, 105 Atl. 712 (Del. 1919). Other similar statutes, more in point, provided for assignment of the idle individual to some useful employment upon terms agreed upon by the assigning state officer and the prospective employer. *E.g.*, Md. Laws Ex. Sess. 1917, c. 33; Del. Laws 1918, c. 3. The Delaware statute was held constitutional in State v. McClure, *supra*, the court recognizing its true purpose and upholding it under the state's war power. The court added: "Nor do we consider it necessary or important to determine what in times of peace may or may not constitute involuntary servitude as meant by the Thirteenth Article of the Constitution." State v. McClure, *supra* at 713. The Maryland statute, still in effect, provides elaborate safeguards for the rights of individuals. Under all such statutes, the individual is little restrained in choice of employments and presumedly could with impunity leave the assigned employer for other useful employment.

[63] Historical considerations were relied upon almost exclusively to sustain compulsory service under seamen's contracts, Robertson v. Baldwin, 165 U. S. 275 (1897), and on public roads, Butler v. Perry, 240 U. S. 328 (1916). *Cf.* Kneedler v. Lane, 45 Pa. 238 (1863).

[64] The fallacy of the historical argument was pointed out by Harlan, J., dissenting in Robertson v. Baldwin, 165 U. S. 275, 288 (1897). From one point of view, the fact that a particular form of involuntary servitude was well known prior to the Thirteenth Amendment would evidence an intent that the Amendment apply thereto—otherwise, there should have been a specific exception. The effect of the decisions has, strangely enough, been to confine the Amendment to special types of involuntary servitude well known at the time of its adoption, such as peonage and long-term contracts for personal service, to render it inapplicable to other equally well-known servitudes, and to leave open its application to any completely novel type of servitude which could not have been in contemplation when the Amendment was adopted. In this light, then, lack of historical background may as well be an asset as a liability in the constitutional argument.

[65] Types of involuntary personal service recognized as constitutional may roughly be divided into two categories—compulsory service directly to the state, and compulsory service directly to, or immediately benefiting, private persons but required in the public interest. Included in the first category are building and maintaining public roads, Butler v. Perry, 240 U. S. 328 (1916); jury duty, *cf.* State v. Cantwell, 142 N. C. 604, 55 S. E. 820 (1906); assistance in making an arrest, *cf.* Dougherty v. State, 106 Ala. 63, 17 So. 393 (1895); attendance as witness, *cf.* State v. Henley, 98 Tenn. 665, 41 S. W. 352 (1897); compulsory military service, The Selective Draft Law Cases, 245 U. S. 366 (1918); U. S. v. Sugar, 243 Fed. 423 (E. D. Mich., 1917); civil service as a public officer, Crews v. Lundquist, 361 Ill. 193, 197 N. E. 768 (1935); London v. Headen, 76 N. C. 72 (1877); MECHEM, THE LAW OF PUBLIC OFFICERS (1890) 155 *et seq.* In the other category might be included service as a seaman, Robertson v. Baldwin, 165 U. S. 275 (1897); *cf.* Southern S. S. Co. v. NLRB, 62 Sup. Ct. 886 (1942); minors under apprenticeship, Kennedy v. Neara, 127 Ga. 68, 56 S. E. 243 (1906); see Case of Mary Clark, Blackf. 122, 123 (Ind. 1821); service in certain private employments whose abandonment would endanger public safety, FREUND, POLICE POWER (1904) §452. Mr. Freund concludes an interesting discussion on this subject as follows: "We may then conclude that in a business affected with a public interest, the violation of a contract of service which is essential to the carrying on of the business, may,

under the Thirteenth Amendment, is the fundamental element that the servitude was in the interest of private persons. In those cases in which the servitude in question was servitude to the State (as has been most frequently the case) little or no necessity existed for inquiry as to the presence of an adequate public interest.[66] The duty to serve the State which the courts have emphasized in these cases appears to be but another form of expression for the underlying principle that where private rights and public interests conflict, the latter must prevail.[67] Though the outstanding instance of compulsory service under a private contract of hire, that of a seaman, was justified on historical grounds,[68] the underlying public interest in the seaman's servitude is apparent and has not escaped judicial notice.[69]

If, by reason of withdrawals of manpower for the armed forces, the stringencies in the labor market render essential some program to assure the availability of the maximum possible number and type of workers required to maintain essential civilian and war production activities, the existence and the legitimacy of a paramount public interest in whatever involuntary servitude is inherent in compulsory transfer and freezing measures seems clear. Under such circumstances, assuming proper worker safeguards, such compulsory servitude, though ostensibly servitude to the employer, is more realistically servitude to the State. Its exclusive purpose is to promote the public, not the employer's interests. The governmental restrictions upon the employer's ordinary rights and privileges in the employment relationship, which accompany the freezing and transfer measures, must clearly disprove the existence of any of the elements which characterize servitudes held unconstitutional by the courts. If the Government enters this field of labor mobilization, the resulting compulsory relationships between employer and worker will probably bear only token resemblance to the usual employment relationship; such servitude as exists will be imposed alike upon employer and worker, and both in a more real sense will be servants of the Government.[70] Objections to these measures under the due process

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as a matter of constitutional power, be punished." FREUND, *op. cit. supra*, at 483; compare note 62 *supra*. Several state statutes limit the right to strike in industries affected with a public interest. *E.g.*, Mich. Pub. Acts 1939, Act No. 176; MINN. STAT. (Mason Supp. 1940) §§4254-26 and 27; COLO. ANN. STAT. (1935) c. 97. Defense work was ruled "affected with a public interest" within the meaning of the Michigan statute, *supra*, in Mich. Att'y Gen. Op. No. 18503. See comments (1940) 40 MICH. L. REV. 1041, 1065.

[66] Compare the summary dismissal of the involuntary servitude objection in The Selective Draft Law Cases, 245 U. S. 366 (1918), with the laborious arguments in Robertson v. Baldwin, 165 U. S. 275 (1897). The dissenting opinion in the Robertson case recognized that "involuntary service rendered for the public, pursuant as well to the requirements of a statute as to a previous voluntary arrangement, is not, in any legal sense, either slavery or involuntary servitude." *Id.* at 298. While this statement was made to distinguish soldiers and sailors from civilian seamen, it suggests that the dissent failed to recognize the public interest in the servitude involved.

[67] *Cf.* Nebbia v. New York, 291 U. S. 502 (1934).

[68] Robertson v. Baldwin, 165 U. S. 275 (1897).

[69] Hume v. Moore-McCormack Lines, 121 F. (2d) 336, 345 (C. C. A. 2d, 1941).

[70] The "essence of involuntary servitude" prohibited by the Thirteenth Amendment is "that control by which the personal service of one man is disposed of or coerced for another's benefit." Hughes, J., in Bailey v. Alabama, 219 U. S. 219, 238 (1911). It precludes serfage, vassalage, villenage, peonage "and all other forms of compulsory services for the mere benefit or pleasure of others." Field, J., dissenting in Slaughter House Cases, 16 Wall. 36, 90 (U. S. 1873). Slavery has been variously defined

clause, insofar as they are based on the subjection of the worker to the employer, or vice versa, must be considered in the light of the principles heretofore discussed with respect to the Thirteenth Amendment; indeed, protection of the individual from the State is more properly the function of the Fifth Amendment than of the Thirteenth.

The amenability of many employers' peacetime rights to suspension and restriction by the Congress acting under its war powers has already been discussed. Compulsory transfer and freezing measures, from the employer's standpoint involve suspension or restriction of the employer's right to enter into, to terminate, and to fix the terms of an employment relationship. Insofar as all these partake of property rights, they are no less subject to governmental control than are those of the property owner during time of war. And just as the goods or facilities of the property owner cannot be taken or diverted to a public use without just compensation,[71] so an employer may not be required, under a freezing and transfer program, to enter into, or to refrain from terminating, an employment relationship, the terms and conditions of which are so unconscionable as to amount to a taking of his property. Hence, either the interests of the employer must be equitably protected in the fixing of the terms and conditions of employment, or, if not so protected, some way must be found to compensate the employer for any possible loss.

To the extent that the right to employ, supervise or discharge a worker partakes of a personal, rather than a property, right, suspension or restriction of the employer's rights is no different in principle from suspension or restriction of the corresponding rights of the worker. The right of the employer to discriminate, in the hiring process, on the basis of age, sex, color, nationality, etc., is, of course, a personal not a property right.

It has sometimes been said that the right of the worker to proffer or withhold his services is in the nature of a property right;[72] from this it might be argued that compulsory service constitutes a taking for a public use within the meaning of the Fifth Amendment, and hence to require just compensation.[73] Though the worker's right to work or not to work for another under the usual employment contract may partake of a property right, as noted above, the relationship that results from compulsory service of the type involved under compulsory transfer and freezing measures differs materially from that which is the subject of an ordinary contract of employment. Though the worker's right may be a property right so far as the employer is concerned, his rights *vis-a-vis* the State are quite different. In compelling a worker to

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but always to include the concept of service for the benefit of the master. Civil Rights Cases, 109 U. S. 3 (1883); Plessy v. Ferguson, 163 U. S. 537 (1896). "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." Butler v. Perry, 240 U. S. 328, 333 (1916). The right of the state to demand services of its citizens, in peace as well as in war, and the corresponding duty of the individual to serve was entrenched at common law. "The right stands on at least as high a necessity as the right of eminent domain." London v. Headon, 76 N. C. 72, 75 (1877); THROOP, PUBLIC OFFICERS (1892) §§165-167.

[71] Int. Paper Co. v. U. S., 282 U. S. 379 (1931); U. S. v. Russell, 13 Wall. 623 (U. S. 1872).

[72] *Cf.* Adair v. U. S., 208 U. S. 161 (1908).

[73] It was so argued in Butler v. Perry, 240 U. S. 328, 333 (1916).

perform services in the State's behalf, the State is not "taking" the worker's property but is asserting its paramount right to restrict his freedom and to control and regulate his conduct in the public interest. And it is well settled that an individual may be compelled to serve the State without any compensation whatsoever.[74] The services rendered pursuant to proper compulsory transfer and freezing measures are rendered to the State, the employer in this sense being a convenient agent through whom the Government exercises its powers.

The more difficult questions of due process will arise, not with respect to the power of the Government to compel an individual to accept certain employment in the public interest, but with respect to the manner in which that power is exercised. A primary problem is the mutual protection of both worker and employer. It would obviously be unconscionable for the Government to compel a worker to work for an employer and then to abandon the field, leaving the worker at the mercy of the employer whose interests are essentially in conflict with those of the worker. Both the Thirteenth and the Fifth Amendment require governmental control of the terms and conditions of employment under such circumstances in the worker's behalf; the latter amendment requires corresponding control for the protection of the employer. It is therefore to be expected that any enabling legislation providing for a compulsory transfer and freezing program will either authorize or will have been preceded by, appropriate controls over wages, hours, and conditions of work; such controls may take a variety of forms, too numerous and varied to discuss here. The fundamental consideration must be the interest of the public, though that interest should in the usual case coincide with the interests of the worker and the employer. The principal danger is that in operation, a particular action resulting in the worker's or employer's detriment may be construed as taken in the employer's or worker's, rather than in the public, interest.

[74] Personal services, as contrasted with property, may be "taken" by the state without just compensation. Butler v. Perry, 240 U. S. 328 (1916); Crews v. Lundquist, 361 Ill. 193, 197 N. E. 768 (1935).

THE WORK OF THE UNITED STATES CONCILIATION SERVICE IN WARTIME LABOR DISPUTES

JOHN R. STEELMAN*

Harmonious labor-management relations have come to have a new significance now that a united America has chosen for its 1942 platform increased, continuous, and all-out production of the arms and supplies necessary to victory. To gain this high goal of production, the President, by Executive Order, named the United States Conciliation Service as the first-line agency to maintain labor-management harmony.

The U. S. Conciliation Service—A Long Established Agency

The present war situation presents many new problems but the job of settling labor-management disputes by voluntary methods of conciliation and arbitration is not new to the Conciliation Service. As his last official act in March, 1913, President Taft signed the bill creating the Department of Labor which gave the Secretary special conciliation powers.[1]

> . . . the Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done. . . .

From this simple statement has sprung the activities of a federal service which has operated continuously for twenty-nine years.

The Service has had no compulsory law to enforce and has no police power. And throughout, it has aimed to be a completely impartial agency.

The Significance of Conciliation

The methods of voluntary mediation and conciliation used by the Conciliation Service are not new. They represent age-old methods of bringing harmony in the midst of conflict. History is filled with the accomplishments of those who have followed the peaceful way of solving problems around the council table. Church councils have ironed out disputes in doctrine. Kings' councils have worked over the major problems of government. Trade associations and labor unions have met

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[1] 37 STAT. 738 (1913), 29 U. S. C. §51.

to agree among themselves upon those principles for which they are organized and those working procedures by which they carry on. Indeed, without conciliation and common agreement there would be no government, no industrial organization, no labor unions, and no orderly way of life.

Although the voluntary *methods* of conciliation and arbitration are not new, their *scope* and *importance* to industry have won for them a place of highly increased importance. Good labor relations (now more accurately termed harmonious labor-management relations), is no longer a theoretical subject which may provide future "food for thought." Harmonious labor-management relations today means ships, and tanks, and guns, and planes in abundance and ahead of schedule.

Successful labor-management programs usually consist of a number of important items: the desire for harmonious relations; definite plans for such a program; the establishment of joint labor-management committees to encourage efficiency, harmony, and increased production; the training of foremen to interpret management to labor and labor to management; the pledge of labor and management to attempt to settle all disputes through negotiation and conciliation; and the provision for necessary arbitration machinery to interpret existing contracts and to settle disputes not solved through conciliation.

It has been said that the peaceful, voluntary settlements are not accomplished as rapidly as settlements by economic strength; and that labor-management programs are only successful after continuous and concentrated effort over a long period of time. These facts are undoubtedly true. Evolutionary processes have always taken much longer and have required more patience than have revolutionary processes. However, today our first desire is not speed of settlement but increased and continuous production. Therefore, our problems must be solved at the conference table for although the settlement may not be as speedy as the settlement by economic strength, it can be a settlement without a stoppage of production.

The Organization of the Conciliation Service and the Cases It Handles

Conciliation, arbitration, and the various special services of the Conciliation Service are carried out by two hundred Commissioners of Conciliation. These men are stationed in the important industrial and commercial centers throughout the country and in the outlying possessions. The assignments are received and their work directed by the Administrative Staff in Washington.

Commissioners of Conciliation are drawn from all walks of life. Some have been personnel managers, industrial relations men, lawyers, labor leaders, employers, and government representatives. In all instances, however, they are chosen for their knowledge and experience in labor-management relations, conference table methods, collective bargaining procedure, and general economics.

For administrative purposes, the Service has divided the country into five regions. Each region has a Regional Supervisor who is in charge of the men of his region. He must assign cases, give advice, direct the work, and provide for the emergency

situations which arise. The Regional Supervisor is able to maintain such contact by telephone, telegraph, mail, and personal travel.

The Director and Assistant Director supervise the work of the Regional Supervisors, build the policy of the Service, coordinate its activities, and provide for the over-all administrative matters.

Commissioners of Conciliation handle all types of cases: strikes, lockouts, threatened strikes, controversies, and sundry disputes. These cases appear in all the various fields and industries. A Commissioner will come in on a case when requested by a representative of labor, management, or the public. When it is believed to be in the public interest, the Service may offer its assistance without a request.

If the assistance of a Conciliator is sought, a telegram should be sent to the Director of the Conciliation Service, Department of Labor, Washington, D. C., and usually within twelve hours a Conciliator will be on the scene ready to arrange for negotiations.

Since 1913, the Conciliation Service has handled more than 42,000 situations involving approximately 32 million persons. During 1941, the Conciliation Service disposed of 6676 situations directly involving more than 4,625,000 workers. Of these situations 4725 were actual labor disputes (strikes and lockouts; threatened strikes and controversies) involving more than 3½ million workers. During the first eight months of 1942, the Service handled 7,576 situations. This represents an 87 percent increase over the number of cases handled in the first eight months of 1941.

Techniques of Conciliation

Conciliation is the peaceful settlement of a dispute through a meeting of minds of the parties concerned. This meeting of minds is accomplished through separate and joint conferences in which the Conciliator, as the impartial party, attempts to bring about a satisfactory settlement. Throughout the life of the Service this method has been used in an ever-increasing way.

The key to conciliation is its *voluntary* character. The parties to the dispute *voluntarily* agree to accept the services of a Commissioner of Conciliation. Separate and joint conferences are *voluntarily* held. And the settlement reached is a *voluntary* settlement arrived at jointly by the parties to the dispute.

Upon being assigned a case by the Washington office, a Commissioner first interviews the party who has asked for his services. He then proceeds to interview the other individuals and groups involved in order that he may attempt to get a clear picture of the whole situation. After several separate conferences with labor and management, and at the appropriate time, he then attempts to plan a joint conference. Sometimes many joint conferences lasting for extended periods of time, or broken by separate conferences, are necessary before the desired settlement can be reached. In all instances the Commissioner is driving forward with one thought in mind—a solution arrived at by the parties and one which is satisfactory to both

sides. Through long experience, Commissioners know that the most lasting settlements are ones made through the meeting of minds of the parties directly concerned.

In fact, the great bulk of disputes are settled through intelligent cooperation at the conference table. Miraculous things happen when labor and management agree to sit down together at the same table and discuss their problems. They frequently discover that they have much in common and through these common interests they find a solution to their problems. There are, of course, no blueprints for settlements by conciliation since the types of disputes are legion. What might work today in one place might fail utterly tomorrow in another. This is not difficulty to understand for conciliation is dealing with human nature and it is variable.

In addition to regular conciliation procedures, a more concentrated form of conciliation, termed by the Service "the panel method," has been used increasingly in the war effort. This method of handling cases was an old custom of the Service which involved inviting to Washington the parties to serious disputes of critical national importance which had not been solved by a Commissioner in the field. The parties then appeared before a panel of three Commissioners where new and concentrated techniques were employed.

After the creation of the National Mediation Board in March, 1941, it was decided to increase the use of the panel method in order to prevent a backlog of unsettled cases. Most of these panel cases were either in the strike or threatened strike stage and involved production or transportation vital to the defense effort. The main issues involved were generally wages, recognition, overtime, and vacations. The War Labor Board, upon its creation, suggested a continuance of the panel method because of the record it had made in the past. The Service agreed to continue this practice but instead of calling the parties to the dispute to Washington, the panel meetings are now held at various places in the field.

Arbitration

Voluntary arbitration has been a function of the United States Conciliation Service ever since the Service was established in 1913. Throughout the years since that time, with an ever-increasing number of arbitration assignments, Commissioners have served as arbitrators in situations involving almost every aspect of employer-employee relations.

Voluntary arbitration is, of course, quite different from conciliation. Arbitration is the adjudication of a disputed point by a third party who makes an award or decision which the parties have previously agreed to accept.

The Conciliation Service is actually engaged in official and private arbitration. In official arbitration, a Commissioner of Conciliation with specific arbitration training is appointed at the joint request of the parties involved. In private arbitration, the Director, at the joint request of the parties, appoints an outside arbitrator from a panel compiled by the Conciliation Service. This panel consists of several hundred names of private public-spirited citizens who have done arbitration work or who have special qualifications in the field.

An arbitrator, either from the staff of the Conciliation Service or as a public member appointed by the Director of the Conciliation Service, does not proceed with a case until both parties have signed a statement agreeing to accept his services and to abide by his decision. After the submission is signed, the arbitrator then calls the parties together to hear the case. Arbitration hearings are usually conducted on the basis of oral testimony and documentary evidence. And the parties also are granted the right to submit briefs.

There are now two principal types of arbitration. The first type is the interpretation of a disputed point of an existing agreement. This type of arbitration is becoming more important with the ever-increasing number of labor-management contracts. Because the parties, at the signing of complicated contracts, are not always clear on the meaning of certain provisions, they are increasingly providing in their agreements that if they are at any time unable to adjust a dispute over interpretation of any part of the contract, the matter shall be submitted to arbitration. It is frequently provided that the Conciliation Service, upon request, will designate the arbitrator. A survey last year of twelve hundred agreements in the files of the Conciliation Service disclosed that 62% contained provisions for arbitration.

The second principal type of arbitration is conducted to form policy where an agreement does not exist or where a new contract is being negotiated. Unlike "arbitration of interpretation," where the case has probably gone directly to arbitration, in "policy forming arbitration outside an agreement," conciliation has usually been tried and arbitration is resorted to only after conciliation has been deadlocked.

Although voluntary arbitration has long played a vital role in settling labor-management disputes in America, at no time has it been as important or as widely used as in the present war effort. This is largely due to the agreement arrived at following the attack on Pearl Harbor at the President's labor industry conference. In labor-management's "no strike or lockout" pledge given at this conference, the representatives promised to settle *all* disputes by direct negotiation, conciliation or arbitration.

Therefore, in order to maintain the continuous and all-out production so necessary to our war effort, the age-old technique of arbitration is playing an important part in the rapid and judicial settlement of many controversies.

Technical Service

If an agreement on a particular point has not been reached through conference table negotiation, the Commissioner of Conciliation may suggest that the disputed point might be satisfactorily adjusted if an impartial study or survey of the question were conducted.

The Conciliation Service has a number of Commissioners with technical training who are equipped to make various types of surveys and studies if requested by both parties to a dispute. The methods employed by these technically trained Commissioners, of course, depend upon the question involved. Observation studies are

made to determine the actual amount of work being performed when there is an alleged overwork load. Surveys are sometimes made of competitive plants to form a basis of settling a dispute when workers contend that the conditions in their plant do not favorably compare with competitive plants. In such cases, data must be gathered and compiled on job descriptions, job assignments, and average hourly earnings. Reviews are made at times of present job evaluation setups when incorrect evaluation is charged. And these technically trained men often act as the impartial members of fact-finding or job evaluating committees.

The work of these technically trained Commissioners of Conciliation is supervised by the Technical Adviser to the Service.

Conciliation Service Cooperates with the War Effort

Throughout the period of the defense program, and of course, now in our war effort, the Conciliation Service has placed primary emphasis upon the promotion of industrial peace in operations vitally affecting our defense and war programs. It has sought to do this in a definitely designed program within the Service and by cooperating with various other governmental agencies vitally concerned with labor-management peace.

Since the beginning of our emergency program, the Service has maintained a liaison Commissioner between the Conciliation Service and the War and Navy Departments, the War Production Board, the National Defense Mediation Board and the present National War Labor Board. The cooperation received from these agencies has made it possible for the Conciliation Service to settle all but a limited number of the most difficult disputes.

In order to establish a definite policy for the settlement of labor-management disputes and to provide further mediation machinery, the President issued an Executive Order on January 12, 1942. This Order creating the National War Labor Board set forth three steps for adjusting and settling labor-management disputes "which might interrupt work which contributes to the effective prosecution of the war": first, direct negotiations by the parties involved; second, conciliation by the United States Conciliation Service; third, mediation or arbitration by the National War Labor Board.

A program of "working cooperation" has existed between the Conciliation Service and the War Labor Board from the time the Board was established. Conferences between the Board and the Service were held immediately after the creation of the Board and a coordinated policy was established for handling disputes. It was decided that prior to the certification of any dispute to the Board, a Commissioner of Conciliation would be assigned to each dispute involving production or transportation of defense materials, and that this Commissioner would remain with the case until it was either settled or deadlocked. In case the Board desires it, the Commissioner of Conciliation might continue the negotiation of the case even after certification.

The War Labor Board is authorized to act when the Secretary of Labor certifies a dispute "which might interrupt work which contributes to the effective prosecution of the war" and which has not been promptly settled by the Conciliation Service. The Executive Order also states that the Board may enter a case at its own discretion after consultation with the Secretary of Labor. *However,* in actual practice the Board has not taken cases on its own motion. The Board has handled only cases which have been certified to it by the Secretary after settlement has been attempted by the Conciliation Service. This practice has been established, contrary to the thought of some, at the request of the War Labor Board. It was the Board's desire in order to avoid a needless backlog of cases and to best serve the nation by handling a limited number of cases quickly and effectively.

Increased Labor-Management Cooperation

Since the declaration of war there have been many evidences that labor and management are cooperating and are using the available mediation, conciliation, and arbitration machinery.

Immediately following the attack on Pearl Harbor, labor-management groups throughout the country pledged their full cooperation to the war effort and promised to maintain continuous production by using available mediation machinery to settle their grievances. And as this labor-management cooperation went into effect, there was a sharp and substantial decrease in the number and duration of stoppages.

This pledged cooperation was further established at the labor-industry conference called by the President December 17. Here labor and management pledged "no strikes or lockouts" for the duration of the war. Before the House Naval Affairs Committee on March 26, 1942, labor again emphasized its pledge of "no strikes for any cause for the duration."

The importance of these pledges was emphasized by the President on February 23, when he said "We shall not stop work for a single day. If any dispute arises we shall keep on working while the dispute is solved by mediation, conciliation or arbitration—until the war is won."

As the period since the declaration of war is viewed, it is seen that although war industry employment has increased rapidly, the time lost due to strikes was only seven one-hundredths of one percent. In other words, the pledge of cooperation has worked 99.93 percent effective.

Last year the average length of strikes was about ten days while this year, the average duration of strikes is about two days. Workers are mostly back on the job the day after the strike. As we compare the time lost through strikes with the time lost through accidents and illness we find that five times as many man-days were lost from colds and respiratory diseases last year as through strikes. Also, twelve times as many man-days were lost from industrial accidents as were lost through work stoppages.

Looking at the picture throughout the record of the Conciliation Service we

find an increased case load. Previous to the declaration of war, the active daily case load of the Service averaged about six hundred. In the last eight months, this daily case load has been tripled. This increase, however, is *not* an indication of a national increase of strikes but rather it is an indication of increased labor-management cooperation. In other words, there is now a sincere desire to present cases for negotiation at an early stage of the dispute. It is then possible to use preventive measures. Therefore, almost all of the cases are being settled without any stoppage of work and thus without any harm to the war effort. An example of this is the record of the Service during the last fiscal year. In this time the Service handled 4,185 threatened strikes and controversies and settled over 94% without any stoppage of work.

To meet the task ahead, however, we know that even one stoppage, no matter how small or for what short duration, is one too many. In order to handle those few cases which have already reached the stoppage stage and the large number of cases in the threatened strike or controversy stage, it has been necessary to increase the staff of Commissioners and for the Service to operate on an almost twenty-four-hour day basis. Even so, this means that Commissioners of Conciliation must carry a load of five to fifteen cases simultaneously. In spite of this heavy load, during the first eight months of this year, 5,744 labor disputes were settled by Commissioners of Conciliation while only 434 cases were certified to the War Labor Board.

The Task Ahead

In spite of notable labor-management cooperation and the all-out efforts of established agencies to bring peace without work stoppage, there is still a tremendous task ahead. As President Roosevelt stated on February 23, "We are coming to realize that one extra plane, or extra tank, or extra gun, or extra ship completed tomorrow may, in a few months turn the tide on some distant battlefield; it may make the difference between life and death for some of our fighting men."

This task looms even larger when we realize that we are continually having new problems to meet. A year ago our problems were rising living costs and desire for union security. Today we have these problems *and* problems of conversion, material shortages, lack of skilled men, contracts for small business, and many others.

Therefore, in order to meet our goals of unprecedented proportions and to be victorious, it will be necessary to utilize all of our resources, our manpower, our machines, and our ingenuity. And we will need the full cooperation of labor and management and unlimited assistance of 130 million Americans.

THE LAW OF THE NATIONAL WAR LABOR BOARD

WILLIAM GORHAM RICE, JR.*

HISTORICAL SETTING

Governmental control of labor relations, so far as it existed, was, till recently, the affair of the states, rather than of the United States. In the last century, labor cases often came before the United States courts, but the legislative and executive arms of the United States did not often embrace such problems. When a major strike involved violence, the executive occasionally sent in the army or went to the courts.[1] More often the President intervened as a supermediator and spokesman of public opinion.[2] And it was in this capacity that the National Government first entered the field in more than a sporadic manner—through the agency of the Conciliation Service of the Department of Labor.[3]

Periods of severe international war demand greater activity in labor disputes by the national authority. In the first place, in wartime a larger proportion of production is for the Government and closely related to what is for the moment the chief concern of the nation—the winning of military dominance. In the second place, idleness of workers which normally is a luxury, expensive to them and to their employer, but unless accompanied by violence, no more disastrous to the public generally than are smokeless chimneys due to other causes, becomes calamitous when the smokelessness of any chimney is a calamity. Both as the purchaser of supplies for the war machine and its mass of employees and also as protector of the economic life and consumption needs of the whole population, the National Government must in wartime take an active role in curing labor disputes. And so it has in both of the World Wars.

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[1] As in the notorious Pullman strike of 1894. See WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 63.

[2] "The President of the U. S. has taken a hand in some 30 great strikes since the turn of the century, sometimes only to send federal troops, but usually to endeavor to prevent or settle the dipute." *Id.* at 237.

[3] The Secretary of Labor was authorized to mediate in labor disputes when the Department was created in 1913. 37 STAT. 738, 29 U. S. C. §51. (In the same year the Newlands Act set up, for the railroad field, the Board of Mediation and Conciliation, 38 STAT. 103, but the first railroad labor legislation had been in 1888, 25 STAT. 501.) Commissioners of conciliation soon were employed and the service has steadily expanded.

The National War Labor Board of 1918-19 worked from a set of principles propounded by the War Labor Conference Board,[4] composed of an equal number of representative employers and representative employees. This bipartite agency, under the double chairmanship of William Howard Taft and Frank P. Walsh, in a sense negotiated within itself a nation-wide collective bargain on certain issues; and the War Labor Board, its alter ego of identical membership, built this bargain into every collective contract or labor situation within its reach. The War Labor Board thus carried into operation through its decisions, beginning in June, 1918, and continuing for a year, the employment code that the War Labor Conference Board had created.

Much of what was then only principles of a board, made potent by Presidential proclamation, has in 25 years become statute law:

(1) The employer's obligation to bargain collectively and not to discriminate on account of union membership; for railroads, through the Railway Labor Acts of 1926 and 1934; and, in the wide field of interstate commerce, first temporarily through Section 7(a) of the National Industrial Recovery Act, as embodied in 1933-35 in the President's Reemployment Agreement and the NRA codes of fair competition, and then permanently through the well-matured National Labor Relations Act of 1935.

(2) Minimum wage rates: for work done under government contracts, through the Walsh-Healy and Davis-Bacon Acts; and, in the wide field of interstate commerce, first temporarily through the NIRA and then permanently through the Fair Labor Standards Act.

Other of the principles of 1918 were by their nature unsuitable except as temporary provisions, particularly that which "froze" the degree of unionization of

[4] The Secretary of Labor, William B. Wilson, appointed the Board on Jan. 28, 1918. Two months later it reported a plan for a War Labor Board. On April 8, 1918, a year after the United States had gone to war, President Wilson, after reciting and approving the appointment of the War Labor Board by Secretary Wilson, proclaimed "for the information and guidance of all concerned":

"The powers, functions, and duties of the . . . Board shall be: To settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the national board, affect detrimentally such production; to provide, by direct appointment or otherwise, for committees or boards to sit in various parts of the country where controversies arise and secure settlement by local mediation and conciliation; and to summon the parties to controversies for hearing and action by the national board in event of failure to secure settlement by mediation and conciliation.

"The principles to be observed and the methods to be followed by the national board in exercising such powers and functions and performing such duties shall be those specified in the said report of the War Labor Conference Board dated March 29, 1918, a complete copy of which is hereunto appended.

"The national board shall refuse to take cognizance of a controversy between employer and workers in any field of industrial or other activity where there is by agreement or Federal law a means of settlement which has not been invoked.

"And I do hereby urge upon all employers and employees within the United States the necessity of utilizing the means and methods thus provided for the adjustment of all industrial disputes, and request that during the pendency of mediation or arbitration through the said means and methods there shall be no discontinuance of industrial operations which would result in curtailment of the production of war necessities."

shops.[5] Even those principles that might have been permanent were abandoned as a part of government policy and public law, during the period of "return to normalcy,"[6] till the onset of economic depression brought a renewal of national support of labor standards—the Norris-LaGuardia Act of 1932, the Railway Labor Act of 1934, the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act—all lasting products of a new economic emergency, different from, but as fateful as, that created by war. Thus nearly all of the 1918 principles that could be made permanent were already statute law in 1941.

The first principle of 1918, "There should be no strikes or lockouts during the war," however, was not law in 1941. It had been a rule in the hour of crisis, and it was one which, as soon as the new hour of crisis struck, was immediately announced by spokesmen of all groups at the President's conference of management and labor that convened December 17, 1941, only a week after the outbreak of war.[7] The other crisis provision of 1918, the freezing of shop unionization, was urged by

[5] "In establishments where the union shop exists the same shall continue. . . . In establishments where union and non-union men and women now work together and the employer meets only with employees or representatives engaged in said establishments, the continuance of such conditions shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right or discourage the practice of the formation of labor unions or the joining of the same by the workers in said establishments. . . . "

Note that shop arrangements were frozen but membership in unions was left liquid. The 1942 issue of maintenance of membership apparently was never raised.

[6] Except perhaps for railroad labor statutes: the Transportation Act of 1920, Title III of which set up the Railroad Labor Board, and the Railway Labor Act of 1926, which abolished the Railroad Labor Board and set up the Board of Mediation, superseded in 1934 by the National Mediation Board. The last-named board must not be confused with the National Defense Mediation Board of 1941-42, of which the National War Labor Board is the successor. In this article "Mediation Board" means the board that operated from March 19, 1941, to January 12, 1942.

[7] This committee was similar in composition to the War Labor Conference Board of 1918. It consisted of twelve representative industrialists, twelve labor leaders (six AFL and six CIO), a moderator (William H. Davis, now chairman of the National War Labor Board), and an associate moderator (Elbert D. Thomas, chairman of the Senate Committee on Labor and Education). Not having achieved agreement, the conference reported to the President and received in reply the following letter of appreciation and farewell.

The White House, Washington, December 23, 1941.

GENTLEMEN OF THE CONFERENCE:

Moderator Davis and Senator Thomas have reported to me the results of your deliberations. They have given me each proposition which you have discussed. I am happy to accept your general points of agreement as follows:

1. There shall be no strikes or lock-outs.
2. All disputes shall be settled by peaceful means.
3. The President shall set up a proper War Labor Board to handle these disputes.

I accept without reservation your covenants that there shall be no strikes or lock-outs and all disputes shall be settled by peaceful means. I shall proceed at once to act on your third point.

Government must act in general. The three points agreed upon cover of necessity all disputes that may arise between labor and management.

The particular disputes must be left to the consideration of those who can study the particular differences and who are thereby prepared by knowledge to pass judgment in the particular case. I have full faith that no group in our national life will take undue advantage while we are faced by common enemies.

I congratulate you—I thank you, and our people will join me in appreciation of your great contribution.

Your achievement is a response to common desire of all men of good will that strikes and lock-outs cease and that disputes be settled by peaceful means.

May I now wish you all a Merry Christmas.

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

management for adoption in 1941 also; but labor would not agree.[8] This was not surprising for, though neither the no-stoppage stipulation, which was agreed to, nor the freezing of shop unionization, which labor rejected, was wholly one-sided, it is obvious that each meant a far greater curtailment of labor's freedom than of management's. The bargain of 1918 was fair because in exchange for these renunciations labor obtained for the war period management's undertaking (1) to bargain collectively, (2) not to discriminate against unionists, (3) to pay a decent minimum wage, etc. But since all these were required by statute in 1941, management now had nothing to offer in exchange for the freezing of shop unionization or at least did not offer anything. While labor readily recognized—to some extent even before the outbreak of war—that striking must be ruled out because of the superlative national need of production, and while this sacrifice of a group interest for the national good strengthened in the long run the position of organized labor in the councils of the nation, there was no denying that in any individual controversy labor's position was weakened so far as it had shelved the threat of collective refusal to work on the terms offered by the employer. Thus labor could properly urge in support of its plea for "union security" that this weakening of the union should be somehow balanced by action of the Government in its role of final determiner of individual controversies, when the present National War Labor Board—tripartite instead of bipartite—took up the task of serving as a substitute for strikes and lockouts in the settlement of labor disputes.

The present Board began its work on January 12th of this year[9] without the

[8] To the three principles acknowledged by both groups the employers wished to add:

"4. The Board shall be governed by the following basic policy:

"Since the right to work should not be infringed by Government order through requirement of membership in any organization, whether union or otherwise, the issue of the closed shop is not a proper subject for consideration or arbitration by the Board, and shall not be included as an issue in any dispute certified to it. The term 'closed shop' includes any provision which requires a person to become or remain a member of a labor organization in order to get or hold a job, or have preference in respect to employment.

"For the duration of the war employers shall not attempt to change the terms, in present contracts, which provide for the closed shop or any of its modifications, except where such change is necessary to conform to the law. Where a closed shop contract does not now exist it may be arrived at by voluntary negotiations between the employer and the labor organization concerned."

[9] Executive Order No. 9017, Jan. 12, 1942, 7 FED. REG. 237, provides:

"1. There is hereby created in the Office of Emergency Management a National War Labor Board, hereinafter referred to as the Board. The Board shall be composed of twelve special commissioners to be appointed by the President. Four of the members shall be representative of the public; four shall be representative of employees; and four shall be representative of employers. The President shall designate the Chairman and Vice-Chairman of the Board from the members representing the public. The President shall appoint four alternate members representative of employees and four representative of employers, to serve as Board members in the absence of regular members representative of their respective groups. Six members or alternate members of the Board, including not less than two members from each of the groups represented on the Board, shall constitute a quorum. A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board.

"2. This order does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted.

"3. The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled

advantage or disadvantage of a special war labor code, such as the War Labor Conference Board had adopted to supplement existing statutory law in 1918. The very national legislation which largely supplied this lack also gave the Board certain problems that did not confront the Board of 1918—for instance the settlement of a boundary of authority with the National Labor Relations Board. It may therefore be doubted whether the Board was really any more "at large" than was the 1918 board. Both in fact had about the same sort of freedom as a daring young man on a flying trapeze.

THE NATIONAL DEFENSE MEDIATION BOARD

The fact that the Board had had a predecessor (also tripartite and of similar composition), the National Defense Mediation Board, for the preceding 8 months, was a doubtful asset, for the NDMB, after a most successful beginning, had lost luster by the withdrawal of the CIO members in protest against its refusal to recommend a union shop in certain coal mines operated by steel and chemical companies—the so-called *Captive Mines* case.

On the other hand, the score of cases in which that board had made formal recommendations which the parties had accepted and the two or three score more in which by mediation it had led the parties to agree, had blazed a path for the new board through some of the besetting problems of procedure and substance.[10] The National War Labor Board received a further legacy from the National Defense Mediation Board—some 30 unfinished cases, most of them CIO cases that had been shelved since the *Captive Mines* episode in November.

Before the outbreak of war, neither the law nor (at least in many cases) any pledge restrained unions from striking; recourse to the Defense Mediation Board was therefore a mere voluntary alternative to economic battle, an alternative that would little appeal to the economically stronger party unless it would yield results substantially as favorable. One important factor that the Defense Mediation Board therefore had to consider in making decisions was the parties' economic strength in each particular controversy. Such a factor twisted the growth of a consistent law of settlement for labor disputes.

The War Labor Board was less harried by such considerations. It could deal with labor controversy in a larger way; it did not have to weigh so heavily the relative economic position of the parties before it in each particular case. All having

in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdicion, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board."

As another article in this issue covers the jurisdiction and procedure of the Board, this article is devoted to the substance of Board decisions.

[10] The Bureau of Labor Statistics will shortly publish a study of the work of the National Defense Mediation Board prepared by Louis L. Jaffe and William G. Rice, Jr., as BLS BULLETIN No. 714.

undertaken, by pledge of their spokesmen in the conference of December, 1941, repeated on many public occasions, not to stop production, the Board did not have to ask first of all, What will these parties accept in place of a bout of picket and boycott? but rather with a long look ahead, What is the best settlement in the interest of maximal production?

The War Labor Board also had the advantage over its immediate predecessor of speaking with more authority. The Defense Mediation Board could "formulate recommendations" for settlement; the War Labor Board can "finally determine the dispute" and use "arbitration" as well as "voluntary arbitration." Exactly what these words mean remains uncertain till put to the test. Perhaps the Board's final determining means that it or the interested party may enforce the Board's order by legal action. Certainly the present Board has the resources that were utilized to overcome disregard of the recommendations of the Mediation Board; and the President, if the need arises, is more likely now in time of war to use means of enforcement at his disposal.

Perhaps the War Labor Board's greatest advantage, apart from having the renewed cooperation of the CIO, was that the Mediation Board had explored the union security question and, though it had suffered the hard fate of many pioneers, had tried out the formula of "maintenance of membership" as a compromise union security measure.[11]

UNION SECURITY

For the union security problem, having unmanned the Mediation Board, cogently threatened the War Labor Board at the outset. Though the employers at the December conference had not succeeded in putting it outside the Board's jurisdiction, when the Board began to decree maintenance of membership (it has never ordered the closed or the union shop), the employer members reiterated their views in a series of dissenting opinions.[12]

The course of adjudication was this. On February 21, the Board announced an interim decision in the *Phelps Dodge Corporation* case, postponing the union

[11] Frank P. Graham, a member of both boards, traces the development of this type of union security in his opinion accompanying the WLB's order in Part II of Ryan Aeronautical Co. (June 18). The Mediation Board's maintenance of membership decisions were made in the summer of 1941. Its only recommendation of any greater degree of union security (Bethlehem Steel Co., Shipbuilding Division, in which the Board voted for the union shop) was made then also. During the eight months from Aug. 7, 1941, to March 6, 1942, the date of the WLB's Marshall Field decision, neither board made a decision conditioning employment in any way on union membership.

[12] Lapham wrote dissents for all the employer members in Walker-Turner (April 10), International Harvester (April 15), and Federal Shipbuilding (April 25). McMillan wrote a dissenting opinion in Ryan Aeronautical, Part II (June 18), where Lapham and Deupree of the employers reluctantly concurred with the majority. The employer members seemed to bow to a settled policy when they (Deupree and Mead) signed the Board order in Phelps Dodge (June 26) without comment; but they unitedly returned to dissent in Caterpillar Tractor (July 5) with an opinion by Lapham and in "Little Steel" (July 16) with an opinion signed by Lapham, McMillan, Mead and Horton. After steadily dissenting throughout July, the employers accepted the inevitable because "nothing constructive could be accomplished by continually voting No as a matter of principle," as they explained in a concurring opinion by Lapham and Black in S. A. Woods Machine Co. (Aug. 1).

security issue pending enunciation of "an authoritative national policy." On March 5[13] in the case of *Marshall Field and Co.* (Spray, N. C., textile mill) it adopted, without opinion and with only one employer dissenting (without opinion), the unanimous recommendation of a panel that the contract oblige the employer (1) to give effect in its payment of wages to a writing thereafter voluntarily signed by any employee assigning wages (to the extent of 25c a week) to the union in payment of dues, and (2) to dismiss any employee breaking his pledge, contained in the same voluntary writing, to continue a member of the union for the duration of the contract.

Then, when the Inland Steel Co. at the start of the *"Little Steel"* case doubted its authority, the Board on March 18 unanimously resolved: "This Board has jurisdiction to consider all labor disputes which might interrupt work which contributes to the effective prosecution of the war, including labor disputes as to union status." And with unanimous support of the Board, the chairman on April 22, quoted this resolution in answer to a similar doubt raised by a speech of William P. Witherow, president of the National Association of Manufacturers.

By then the Board had disposed of two cases—*Walker-Turner Co.* on April 12 and *International Harvester Co.* on April 15—in each of which the panel had disagreed on the union security issue, and in them the Board had decreed maintenance of union membership as a condition of employment, the employer members in each case dissenting. *Walker-Turner* differed from *Marshall Field* chiefly in that (1) the maintenance obligation attached to all employees who were members on or after November 27, 1941, a long past date, instead of only to those who made a pledge of maintenance of membership after the date of the decision; and (2) there was in *Walker-Turner* no general check-off provision, and the obligation to maintain membership had a loophole—the employer might retain an employee who had lost union membership if the umpire under the contract agreed thereto and if the employee made, and the employer honored, for the duration of the contract a wage assignment to the union of the amount the employee would have owed the union as dues if he had remained in membership. Though the anti-union conduct of the particular employer makes the retroactivity of the order understandable, it was a feature which provoked strong dissents from the employer member of the panel and then from the 4 employer members of the Board. The other 8 members joined in the order substantially as recommended by the panel majority. But no subsequent decision has had a retroactive feature. Then in *International Harvester,* acting against the majority recommendation of a panel split 3 to 2, the Board ordered maintenance of membership provided it were endorsed by a majority of the mem-

[13] The dates tied to cases are those appearing on the news releases announcing decisions. Such publication ordinarily occurs on the day or the morrow of the Board's vote, but there is sometimes delay as in order that the parties may be first apprised or that Board members may complete opinions for simultaneous release. In the Marshall Field case the recommendations of the panel were "approved" on Feb. 13. Because the company doubted whether this imposed an obligation, the Board on Feb. 25 "finally determined" the controversy by a "directive order."

bers of the bargaining union in an election conducted by the Board. The employer members placed their dissent on the Board's refusal to allow employees individually to opt whether to subject themselves to the rule. This group referendum variant was devised by the Board in order to test the stability of the bargaining unions in a group of plants where there had been strong AFL-CIO rivalry culminating in certification of the AFL in some plants and of the CIO in others. When the referendum vote was taken, maintenance of membership was strongly endorsed in every plant.

In the *Federal Shipbuilding and Dry Dock Co.* decision (April 25), the Board, without any panel report and with the employer members dissenting, required maintenance of membership with the *Walker-Turner* loophole (minus the approval of an umpire) but, as explained in Chairman Davis's opinion, applying only to members on or after the date of the contract then in negotiation. This was reiterating the solution of the controversy that had been recommended by the National Defense Mediation Board in July 1941, but had never actually been put into operation.[14]

In *Robins Dry Dock and Repair Co.* the panel's report was unanimous again, and, unlike *Marshall Field* but like *Federal Shipbuilding,* the recommendation did not require individual acceptance of the maintenance rule but imposed it on all who were members at or after the effective date of the contract. Though this clearly allowed employees an opportunity to withdraw from the union before the contract was completed, the employer members again dissented from the Board's order,[15] which followed the panel report; and so they did from the similar decisions in *Brown & Sharpe Manufacturing Co., Nevada Consolidated Copper Corp.,* and *Hotel Employers Association of San Francisco.*[16]

The Board in deciding the *Ryan Aeronautical Co.* case[17] varied the formula to make the starting date of the obligation to maintain membership not that of the completion of the contract in negotiation, but 15 days after the date of the Board's decision. This *Ryan* type of maintenance of membership won some employer support in the *Ryan,*[18] *Ranger, E-Z Mills,* and second *Phelps Dodge*[19] decisions. In making them the Board overruled the mere voluntary check-off proposal of the panel in *Ranger* and rejected unanimously the alternative of the *Walker-Turner* loophole that was tendered by the panel in *Phelps Dodge.* After this momentary approach to unanimity, *Caterpillar Tractor, "Little Steel," J. I. Case, U. S. Rubber,*

[14] The Mediation Board recommendation (with employer dissent) had no "Walker-Turner loophole." It was that the contract contain a maintenance of membership clause covering "any employee who is now a member of the union or who hereafter voluntarily becomes a member during the life of this agreement." Whether the "now" meant the date of the recommendation or the date of completing the contract was never debated or decided. Exactly the same words were used in the WLB's order.

[15] Robins Dry Dock and Repair Co. (June 2).

[16] Announced June 3, 4, and 4, respectively.

[17] June 18. The accompanying opinions of the employer members apply also to Ranger Aircraft Engines and E-Z Mills (both June 12).

[18] Though announced later, Ryan was actually decided before Ranger and E-Z Mills.

[19] June 26.

and *Buckeye Cotton Oil*[20] divided the Board again on maintenance of membership. In all these cases a 15-day period of choice was allowed to present union members.

After the unanimous decision in *Phelps Dodge* on June 26, it was a surprise to find all four employer members in opposition in *Caterpillar Tractor* on July 5. In writing the opinion of the Board in this case Wayne L. Morse, a public member, reviews at length the vicissitudes of the Board in dealing with union security. The opinion of another of the public members, Frank R. Graham, in the *Ranger* case had rehearsed the leading decisions of the Mediation Board and explained the theory of the public members in espousing maintenance of membership as a compromise between required union membership, generally desired by the labor group, and mere reiteration of the obligation of indifference imposed by the NLRA on all employers apart from contract, generally desired by the employer group. Dean Morse's opinion supplemented President Graham's by showing the course of discussion by which the employer members' offer, expressed in their *International Harvester* dissent, to acquiesce in maintenance of membership, if conditioned on an affirmative individual acceptance (as in *Marshall Field*) or if accompanied by an adequate opportunity of each employee to make individual withdrawal (as in *Ryan*), had been persuasive with the public members to create the *Ryan* type of order on maintenance of membership, which had been accepted, very reluctantly, by the labor members in the interest of unanimity on this troublesome question. But, having won their point, the employers now raised a new condition, namely, that the union, to obtain maintenance of membership by order of the Board, must agree to supply to the Board twice a year its financial statement and other data. Employer member Roger D. Lapham's concurring opinion in the *Ryan* case had indicated doubt because of this omission; now he announced his opposition and Morse took him to task for thus breaking the unanimity that had been wrought. Later in *S. A. Woods Machine Co.* (August 1) Chairman Davis condemned this proposal "to extend a continuing control by the Board over a labor union" as "the worst vice of administrative tribunals—an attempt to extend jurisdiction beyond the frame of reference under [within] which the tribunal acts."

Throughout July the employers maintained their opposition unbroken and emphasized it in the *"Little Steel"* case, which added to membership maintenance compulsory check-off of union dues; but on August 1, in the belief that "constant emphasis on disagreement could serve no useful purpose in this critical period," the employers rejoined the other groups in *S. A. Woods Machine Co.* and *Borg-Warner Corp.*, decisions that probably mark the end of the cleavage, though the employer members by their concurring opinion "reserve their rights to reverse or revise their position . . . particularly when they think because of some special facts the public interest would not be served by granting maintenance of membership."

[20] Caterpillar Tractor Co. (July 5); "Little Steel" (Bethlehem Steel Corp., Republic Steel Corp., Youngstown Sheet & Tube Co., Inland Steel Co.) (July 16); J. I. Case Co. (July 22); United States Rubber Co. (July 23); Buckeye Cotton Oil Co. (July 31).

It will be remembered that in the *Marshall Field* formula the check-off was combined with maintenance of membership, and so it was in a secondary manner in *Walker-Turner* and *Federal Ship*. Not till *"Little Steel"* did the Board, and then without a panel recommendation, order both the check-off and maintenance of membership. They were again tied together in *Buckeye Cotton Oil Co.* (July 31), with the employers dissenting on both points. But the check-off without maintenance of membership had been ordered without employer dissent in several earlier cases upon unanimous recommendations of panels. In one case, *Bower Roller Bearing* (March 12), the check-off was compulsory as to *new* members of the union. It was made compulsory, applying to all employees who were or became union members, in the *"Little Steel"* decision. In all other cases, before or since, it has been voluntary and revocable (revocable only on 60 days notice in *Remington Rand*); that is, the employer has been required to check-off only for those employees whose individual (voluntary and revocable) written wage assignments to the union for the specified amount have been presented to the employer.

Apart from maintenance of membership and the check-off of union dues, all union security provisions of the Board decisions are based on varying recommendations of unanimous panels. Discipline of opponents of the union,[21] recommendation that new employees join,[22] preference to unionists in hiring,[23] are the several degrees and types of union security that have been thus endorsed by the Board in decisions during its early months. Since the Board began to grant maintenance of membership despite employer dissent, panels have almost ceased to recommend the less potent supports of union strength.

In other words, despite persistent denial that the Board is devising any patterns[24] of labor settlement, there now appears to be a program of requiring maintenance of membership (after 15 days) and voluntary check-off if a worthy union asks for them or for any stronger form of union security. While various arguments for maintenance of membership have been set forth such as (1) offsetting an environment hostile to the bargaining union, due to community opinion, employer's conduct, or militance of a rival union;[25] or (2) confirming a record of stability, fairness and responsibility of the bargaining union (*e.g.*, that this is not the first contract between employer and union),[26] apparently these are not necessary factors, for

[21] Armstrong Brothers Tool Co. (May 7).

[22] Babcock & Wilson Co., Bayonne, N. J., plant (April 22).

[23] United States Lines (May 27); Hotel Employers Ass'n of San Francisco (June 2).

[24] It is "impossible to devise any one pat formula or union maintenance clause that could be applied uniformly as a policy pattern to each and every case," says Morse in the concurring opinion in Caterpillar Tractor. Yet he "respectfully submits" that the employers are inconsistent in now dissenting, for "one will look in vain for any vital difference between the facts and circumstances of the Ryan, Ranger, E-Z Mills and Phelps Dodge cases and the instant case which will support this reversal of position on the part of the employers."

[25] See the panel report in International Harvester and second Phelps Dodge.

[26] See the panel report in Armstrong Brothers Tool Co. It may be further argued that since the policy of wage stabilization deprives unions of much of their economic appeal to waverers and since unions are valuable social institutions, there is now a peculiarly strong call for a policy of stabilizing union membership.

opinions are often silent concerning them. A marked absence of the latter factor but not of the former would dissuade the Board[27] from requiring dismissal for non-maintenance of membership—or probably requiring check-off of dues—but the only positive reason given in some of the Board's best considered declarations is (3) the general one, applying to all cases, that is set forth in the following passage from the Board's opinion (*per* Graham) in *Caterpillar Tractor*—in part repeated in *"Little Steel"*:

> This maintenance of union membership on the part of those who exercise the choice to be bound by it, is simply an equitable consideration of [compensation for?] the union's giving up the right to strike for the union shop and the closed shop. By and large, this maintenance of a stable union membership makes for the maintenance of a responsible union leadership, the maintenance of loyal union discipline, and the maintenance of maximum production for winning the war.

The broadness of this basis made the employers point out in their *"Little Steel"* dissent:

> Despite the varied facts in the ten cases [in which the Board had since June 2 decreed maintenance of membership], the public members of the Board have always found justification for ordering maintenance of membership. In the case before us the majority opinion is predicated on the fact that the union is well established and responsible. Yet in the Ranger Aircraft case the need for security by the union was based on its loss of members, and in the Caterpillar Tractor case the majority opinion, which implied a recognition of the present lack of responsibility on the part of the union, stated "This maintenance of a stable union membership makes for the maintenance of a responsible union leadership." The record clearly indicates that the concern of the public members of the Board has been for the formula. . . . But the employer members are unalterably opposed to the Board's present trend toward the application of this or any other formula as a concession to unions in all or most cases coming before it. Confirmed action of this sort by an agency of the government has the effect of law.

This pattern-making or fabrication of new reaches of law by the process of deciding actual cases—so congenial to our legal tradition—is taking place in other fields besides union security. But here it was most original, for maintenance of membership was scarcely known when the Mediation Board began to try it out,

[27] This appears to be the gist of the opinions in S. A. Woods Machine Co. (Aug. 1). Messrs. Lapham and Black reveal the debate that preceded the opinionless 6-3 order for maintenance in U. S. Rubber: "In discussing the U. S. Rubber Company case the public members of this Board made plain their belief: . . . (d) That insofar as employers were concerned maintenance of membership should be required, regardless of whether employers are good, bad or indifferent, or are pro-labor, anti-labor or what-not.

"In the U. S. Rubber Company case it was unanimously conceded that the relations between employer and union were excellent and that there was nothing in the record of the company *per se* that justified or required a maintenance of membership clause. . . .

"Presumably the granting of a maintenance of membership clause in the U. S. Rubber Company case fixes a pattern applicable to all employers. But it is yet to be determined if such a pattern will be applied in favor of all unions, whether they be responsible or irresponsible."

Chairman Davis quieted the employers' anxiety: "The employer members expressed their view that the maintenance of membership clause should not be granted to a union in a particular case unless the Board was satisfied that the union was responsible and was operated according to certain well-established democratic principles under its constitution and by-laws. The public members of the Board agree with the employer members in this respect completely."

and is now most settled, for maintenance of membership as well as voluntary check-off is now likely to be awarded when asked for, unless the union is irresponsible or not "operated according to certain well established democratic principles."[28]

WAGES, WAGE DIFFERENTIALS AND RELATED ISSUES

The question of wages—basic or standard wage rates—has come up more frequently than any other and has evoked more dissents than any other—or indeed than all others—except union security. Before the announcement of the President's seven-point stabilization plan on April 27th, the Board's decisions were tacitly or expressly based on vague considerations of fairness or equalization.[29] (Permitting the reconsideration, before the general expiration of the contract, of wage rates upon notice of 30 or 60 days, or at stated intervals of 3 to 6 months, or on stated dates, or in one case[30] upon 5% change in cost of living, was a provision found in several orders before *"Little Steel,"* but in none thereafter.) Since the *"Little Steel"* decision wage raises are ordered only (1) to correct "inequalities" between groups and (2) to correspond with the climb in cost of living. The first ordinarily requires a survey by the Bureau of Labor Statistics in which the wage rates in the instant plant are compared with those in (a) competing plants and (b) plants in the locality where similar skills are requisite. The relative weight of these factors is not clear. Quotations from recent opinions will give the best notion of the Board's attitude.

In the *"Little Steel"* case (July 16), the Board's opinion by George W. Taylor, public member and vice-chairman, states:

> In full recognition of its grave responsibility to the nation, and for reasons later detailed in this opinion, the National War Labor Board has determined that the following guiding principles should be applied in evaluating claims for wage increases:

[28] Quoted from opinion of Chairman Davis in S. A. Woods Machine Co. (August 1) *supra* note 27. In the Borg-Warner case of the same day the Board awarded maintenance though the panel (in a report dated June 11) had unanimously refused to recommend it. This solidification of the Board's policy between June 11 and August 1 is noteworthy.

The Woods case contains the latest standard edition of union membership provisions as follows:

"All employees who, 15 days after the date of the Directive Order of the . . . Board in this case are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement, as a condition of employment, remain members of the Union in good standing.

"The Union shall promptly furnish to the . . . Board and to the Company a notarized list of members in good standing 15 days after the date of the Directive Order. If any employee named on that list asserts that he withdrew from membership in the Union prior to that date and any dispute arises, the assertion or dispute shall be adjudicated by an arbiter appointed by the . . . Board whose decision shall be final and binding upon the Union and the employees.

"The Union agrees that neither it nor any of its officers or members will intimidate or coerce employees into membership in the Union. If any dispute arises (as to whether these has been any violation of this pledge or whether any employee affected by this clause has been deprived of good standing in any way contrary to the constitution and by-laws of the Union) the dispute shall be regarded as a grievance and submitted to the grievance machinery."

[29] Breeze Corps. (May 22), Chase Brass and Copper Co. (May 28), and of course "Little Steel" (July 16) contain particularly significant recognitions of the President's speech. Price ceilings were mentioned as a brake in an earlier panel report of which the Board adopted the wage recommendations, Walker-Turner (April 10). The Board approved the panel's recommendation of severance of the tie between wages and retail prices of the product (copper) in the Phelps Dodge cases (June 25).

[30] Babcock and Wilcox Co., Bayonne, N. J., plant (April 22).

(1) For the period from January 1, 1941, to May, 1942, which followed a long period of relative stability, the cost of living increased by about 15%. If any group of workers averaged less than a 15% increase in hourly wage-rates during, or immediately preceding or following, this period, their established peacetime standards have been broken. If any group of workers averaged a 15% wage increase or more, their established peacetime standards have been preserved.

(2) Any claims for wage adjustments for the groups whose peacetime standards have been preserved can only be considered in terms of the inequalities or of the sub-standard conditions specifically referred to in the President's message of April 27, 1942.

(3) Those groups whose peacetime standards have been broken are entitled to have these standards reestablished as a stabilization factor.

(4) The Board, as directed by the President in his April 27th message, will continue to "give due consideration to inequalities and the elimination of substandards of living."

(5) Approximately twenty wage disputes, still pending before the Board, were certified prior to the stabilization date of April 27th. The question arises in these cases whether wage-rates being paid on April 27th, 1942 can or cannot be considered as "existing rates" within the meaning of the President's message or whether they then had the tentative character of disputed rates. Due regard must be given to any factors of equity which would be arbitrarily swept away by "a change of rules in the middle of the game."

The guiding principles outlined above insure, in general, that claims for wage-rate adjustment can be considered on an equitable basis and in a manner which will further the national purpose to stabilize the cost of living. Their use in the present case, however, is not to be construed as establishing an inflexible pattern to be rigidly followed if that would unnecessarily lead to injustice.

The opinion of the Board by Wayne L. Morse, public member, in *Remington Rand Co.* (July 27) states:

It is clear that the employees involved in this case are not entitled to a further wage increase at this time on the basis of any change in cost of living since January 1, 1941, in view of the wage stabilization formula laid down by the Board in its decision in the "Little Steel" case.

[Here the opinion quotes paragraphs (1) and (2) in the above quotation from the "Little Steel" opinion.]

It follows from an application of the Board's wage stabilization formula that the workers in the instant case have not suffered any lowering of their peacetime standards as they existed on January 1, 1941, because of any increase in cost of living in excess of wage increases from January 1, 1941 to May, 1942. In fact, the record shows that these employees have received a percentage wage increase during that period of time in excess of the percentage increase in cost of living for the same period of time.

The Board then looked to see if the employees in these plants suffer from substandard wages or wage inequalities. It is satisfied from the record that the wages are not substandard but it does find, however, that the female employees hired on an incentive work basis do suffer from a wage inequality in the amount of two and one-half (2½c) cents per hour. This inequality results from the fact that there has been a growing disparity between the wages paid men and women workers in the plants of the company. . . .

The decision of the War Labor Board in this case demonstrates the applicability and workability of the wage stabilization formula which it has adopted. It will not follow, as publicized in the press, that an application of the formula will result in a huge increase in the Nation's wage bill, totaling three or more billion dollars. The National Asso-

ciation of Manufacturers has called attention to the fact that over two thirds of the manufacturing industries of the country have already made increases equal to or in excess of the level fixed by the War Labor Board's formula. The other one third have made increases averaging close to the 15 per cent called for under the formula. Hence, the application of the Board's formula will result in only minor increases in the Nation's wage levels. Such wage increases as will be allowed by the formula will be so insignificant in contrast with the total wage bill of the country as to have no inflationary effect.

The Board is satisfied that if the formula is permitted time in which to work, it will result in a sound wage stabilization program. What the formula will do is place a terminal on the race between prices and wages and prevent the beginning of another upward spiral of general wage increases with their inflationary effects.

The formula permits of fair and reasonable adjustments of inequitable and substandard wages and it maintains reasonable standards of living necessary for maximum production of war materials. Contrary to some reports, it does not guarantee to labor that existing standards of living will be maintained throughout the war. Even before the "Little Steel" decision the Board had pointed out in several cases that labor cannot hope to receive wage increases which will enable it to keep pace with upward changes in cost of living.

After these firm and explicit pronouncements, it is clear that in wage determinations the Board has laid down rules that it intends to observe and to require others within its power to observe.[31]

In the field of overtime pay for work on the sixth and seventh consecutive day, the Board has sometimes approved "time and a half" for sixth day work[32] and usually "double time" for seventh day work, sometimes with slightly different pro-

[31] These decisions still leave many wage problems outstanding, such as: (1) what weight should be given to wage increases in the latter part of 1940; (2) what account should be taken of wage and cost-of-living changes after April 27, 1942; (3) what effect should be given to proof that wages on January 1, 1941, were exceptionally high in the plant, industry, or locality; (4) to what extent wage changes, based on (a) length of service, (b) upgrading, or (c) dilution (*e.g.*, replacement of skilled workers by semi-skilled at a lower wage, or men by women at a lower wage), (A) when made after January 1, 1941, should count in computing how far wage increases have kept pace with the cost of living, or (B) should be required to be made (or should be reckoned as if made in computing the wage increases needed to keep pace with the cost of living); (5) to what extent wage increases lessening inequalities (a) between occupations or sexes or races within the plant, or (b) between this plant and others in the locality or in the industry, or (c) between this locality and others (regional differentials), (A) when made after January 1, 1941, should count in computing how far wage increases have kept pace with the cost of living, or (B) should be required to be made.

In addition to stabilization (cost of living) increases, the Board is likely to continue to do something in the direction of equalization at least in situation (5) above. Following the strong plea for such action by the dissenting panel member in Buckeye Cotton Oil Co., the Board's unanimous action (July 31) in giving the lower-paid (colored) workers a 6c raise and the higher-paid (white) workers a 4c raise (the amount recommended for all by the majority of the panel) is a striking instance of a wage raise for equalization of type 5 (a).

[32] But in International Harvester (April 15), Ryan Aeronautical (June 18) and Borg-Warner Corp., Warner Automotive Parts Division (Aug. 1) the Board gave no special rate for the sixth consecutive day but only the double rate for the seventh consecutive day and of course the 150% "penalty" rate of the Fair Labor Standards Act for any work over 40 hours a week or 8 hours a day. In the last-named case the Board without explanation cut out the sixth-day overrate that had been unanimously recommended by the panel. No overrate for sixth-day work therefore seems to be the prevailing policy. A 150% rate for Saturday work under special circumstances (holidays or sickness earlier in the week) was approved in Bower Roller Bearing Co. (March 12), where the 40 hours FLSA rule normally provided this higher rate for Saturday work.

visions where there is a "swing shift," which were worked out by the parties in the *General Motors* case[33] and imposed by the Board in the *Bendix Aviation* case.[34] The new wartime standard of no higher rate merely because work is performed on holidays, Saturdays and Sundays ("no overtime pay for Saturdays, Sundays, and holidays as such") recurs constantly in Board decisions with variations to suit differing situations. To some extent the higher rates for sixth and seventh day work overlap the statutory requirement of "time and a half" for all work in excess of 40 hours a week.[35]

Likewise, the Board, usually upon panel recommendation, has repeatedly granted[36] and never denied[37] higher rates for night shift work. This was an issue in the first decision of the Board,[38] an issue on which the Board divided 7-5 as to the *amount* of differential. The decisions do not show uniformity in the amount of night shift bonus. It has varied from 3c for the evening shift in the case just mentioned to 10c for the early morning shift.[39]

Another provision that seems to be tending toward standardization is the paid vacation (or, during the war period, pay of equal amount in lieu of vacation). But there is wide leeway in the relationship between (1) the length of service or the seniority of the individual and/or the time worked by the employee during the year in which the vacation was "earned" and (2) the duration of the vacation and/or the amount of vacation pay. The most that the Board has ordered is two weeks vacation and two weeks pay.[40] Usually, but not always, the pay is what the employee would have earned during his vacation period, but earnings for a standard week are used rather than average earnings of the individual employee.[41]

[33] Over the strong protest of the company (at public hearing before the Board on May 7) the Board required (orders of May 1 and 21) the whole of the expiring contract, including a double rate for Saturday and Sunday work to be extended for a month while the details of the new plan were being worked out.

[34] Bendix Aviation Corp., Bendix Products Division, South Bend, Ind. (July 6) allowing 150% pay on the sixth consecutive day, following unanimous panel recommendation. But compare Borg-Warner Corp. (Aug. 1), *supra* note 32.

[35] In maritime occupations the Board has never required double pay. A 150% rate was decreed in United States Lines (May 27) for work over 8 hours a day at sea (not covered by FLSA) and for night work, and in W. J. Conners Contracting Co. (June 17) for night, Sunday, and holiday work. The Board, without opinion and following the panel majority, refused to order any higher rate of pay for work over 40 hours a week in processing cottonseed (not covered by FLSA) in Buckeye Cotton Oil Co. (July 31). There was an eloquent dissent in support of "time and a half" by the labor members (per Richard Frankensteen and Martin P. Durkin).

[36] (Besides cases mentioned in adjacent notes) Babcock & Wilcox, Bayonne, N. J. (April 22) where the differential was 5% for shift B and 7½% for shift C. The differential is usually expressed in cents. Compare note 44, *infra*.

[37] But they were denied in an *arbitration* by a Board panel in American Smelting Co. (April 2).

[38] Aluminum Company of America (Feb. 10).

[39] Breeze Corps. (May 22). Percentage allowances may run higher. See note 35 for extreme examples.

[40] Bower Roller Bearing Co. (March 12), Realty Advisory Board on Labor Relations (Aug. 3), both following unanimous panel recommendation.

[41] In White Sewing Machine Co. (May 1) the Board adopted an elaborate recommendation of a unanimous panel. The vacation was expressed in days (at the rate of 1¼ days for each six months of service, with a maximum of 5 days) and pay per day was to be 8 times hourly earnings at the standard rate ("straight time"). Elaborate vacation provisions for the lumber industry are contained in the arbi-

Other ancillary questions about pay have arisen in too few cases to be indicative of any course of thought.[42] Troublesome financial questions peculiar to the Boston fishing industry—who should pay for extra insurance costs on the fishermen's lives and personal effects due to the war?—were disposed of by a series of decisions in *Federated Fishing Boats Co.* (Feb. 10, April 2, and June 16). The matter of minimum pay rates has been dealt with in several cases, but these, as well as the effective date of pay raises and the duration and adjustment of wage scales, are so closely tied to the question of standard wages that they have meaning only in that relation. It may be said in general that pay increases (including differentials and ancillary pay changes) are made retroactive to the date of expiration of the former contract or, if never fixed by contract, usually to the date of certification of the case to the Board.

Frequently the minimum or entering wage[43] or all lower wages have been raised by a larger percentage,[44] or even a larger amount,[45] than higher wages. Similarly the wage scale differential between northern and southern plants of the same company was lessened in the Board's very first decision.[46]

In no case has the Board ordered a lower wage than that prevailing. In many it has denied increases.

GRIEVANCE PROCEDURE AND OTHER ISSUES

The cases that deal with disagreements concerning grievance procedure and arbitration reveal only that the Board is trying to create adequate machinery for self-rule in collective labor relations; even to the point of requiring the parties to agree to arbitration.[47] Nor is there need to comment on numerous other issues treated occasionally.[48]

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trators' awards in Employers Negotiating Committee (Puget Sound Douglas Fir area), approved by the Board (June 17 and July 3). Here the maximum was five days and the pay (obtainable only if vacation was actually taken) was again on a "straight time" basis. In Phelps Dodge (June 25) the vacation plan recommended unanimously by the panel and adopted *per curiam* by the Board, was simple: one week and 48 hours pay for employees who had worked a year or more. Proportionate vacation pay was allowed to persons who left to enter military service in Babcock & Wilcox (April 22).

[43] The Board ordered in International Harvester (April 15) that union representatives when employees should not lose pay while handling grievances. In New England Textile Operators (July 7) the Board "recommended to the consideration" of the employers the payments of "severance pay" to workers entering military service. In Breeze Corps. (May 22) the order required that men and women receive equal pay for the same work; more often, however, the Board had approved scales differentiating between men and women, though sometimes lessening the differential, as in Remington Rand (July 28). In each of the above-named cases the Board followed a unanimous panel recommendation.

[44] *E.g.*, Ryan Aeronautical, Part I (June 18); Phelps Dodge (June 25).

[45] A wage increase of so many cents for all workers is the most usual prescription.

[46] *E.g.*, Arcade Malleable Iron Co. (May 1); New England Textile Operators (July 7).

[46] Aluminum Co. of America (Feb. 10). The employer members dissented on the ground that the raising of the wage scale of the southern plants made it too disparate from the scale prevailing in the communities where the plants operated.

[47] Caterpillar Tractor (July 5); S. A. Woods Machine Co. (Aug. 1). This is, of course, "compulsory arbitration."

[48] These fall under four main heads: (1) Interim orders, pending final disposition by negotiation or by Board order, covering job classification studies, wage surveys, and a great variety of other matters;

ARBITRATION

Limitations of time and space prevent consideration of the arbitration awards that have been made under Board auspices. They are in one sense part of the jurisprudence of the Board, but rather by reflection than by direction. In most cases, the Board merely appoints an arbitrator or arbitrators whose decision is final. In wage cases, however, it is now usual to require confirmation of the award by the Board. The terms of arbitration may allow the Board to revise the award or they may merely give the Board the choice between approval or rejection. Whichever the type, the awards are not likely to depart from discoverable principles of Board decisions; of those which the Board may revise or veto, none yet has failed to be confirmed. Several awards have been casually mentioned already. The fact that the decisions of arbitrators are not sharply scrutinized and controlled results, presumably, in their having less effect on subsequent decisions of the Board or of other arbitrators than do the original orders of the Board or the orders embodying or modifying recommendations of panels.

One class of arbitration requires special mention, that of controversies concerning demarcation of jurisdiction between unions. This is one of the many points where activities of the Board impinge on those of the National Labor Relations Board—contacts which are now dealt with by the two boards on an *ad hoc* basis but which promise to come some day into the spotlight and to require more scientific treatment. "Jurisdictional disputes" involve the settlement of boundaries that correspond to those necessary for the NLRB to fix for collective bargaining. If such disputes are to be settled by government at all, the NLRB, rather than the War Labor Board, seems the qualified agency.[49] But they often fall at or beyond the border of the NLRA power—as in cases of conflict between a production group and a building group over renovating buildings or installing new machinery or moving old machinery to new or remodeled buildings.

Due rather to the urgency of quick decision to hasten the installation of machinery for war production than to any theoretical considerations, the Board has actually, though quite unwillingly, required arbitration of several demarcation disputes. The AFL and CIO having failed to devise machinery for settlement of these controversies, the Board very early received certification of such a controversy concerning the outfitting of new buildings of the Toledo plant of the Spicer Manufacturing Company. This case was referred to a panel, but, as the panel's mediation was un-

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(2) relations with the NLRB, the Office of Defense Transportation, and other government agencies as in Los Angeles Railway (Feb. 19), Sperry Gyroscope Co. (May 7), Central Foundry (June 11), U. S. Cartridge Co. (July 4), and Ohio Public Service Co. (July 31); (3) interpretation of contracts and refusal to order alteration of existing contracts, as in Midland Steel Products Co. (June 11), though a change was *recommended* in Babcock and Wilcox (Feb. 27); (4) miscellaneous terms of contracts in negotiation, such as race equality—Phelps Dodge (Feb. 19); "superseniority" for shop stewards—Armstrong Tool (May 7); seniority—American Brass Co. (June 25); leave of absence on union business—Babcock & Wilcox (April 22), Armstrong Tool (May 7).

[49] Compare Kingston Products Corp., a WLB case which was disposed of by a Green-Murray agreement to refer it to the NLRB.

successful, it returned to the Board which, after hearing the unions (the employer resting neutral), voted unanimously to leave it to arbitration by the chairman with the benefit of the consultation and advice of the three other public members. The award was made on February 20: electrical wiring and installation of new machines to be done by the AFL building trades and moving and remounting of old machines to be done by the CIO maintenance workers at the plant.

Then on April 29th, Chairman Davis announced an AFL-CIO agreement whereby the labor members of the Board should thereafter settle such disputes, or, that failing, Presidents Green and Murray should appoint persons to settle them. But though this procedure yielded results in some cases,[50] it failed in others and the Board, with[51] or without[52] concurrence of the labor members, ordered arbitration to prevent a work stoppage. After the *Spicer* case, it was felt to be preferable to divorce the Board from the settlement; so the Board put the responsibility of final decision on the arbitrator it appointed.

In July there was a strike because of a demarcation dispute which could not be settled without intervention of the Board. The situation evoked the following insistent telegram to the labor participants in the President's December conference, from two of the Board's employer members, Cyrus Ching and Roger D. Lapham:

> At conference of labor and industry representatives called by the President last December the six AFL and six CIO members of that conference pledged themselves to no strikes or stoppages of work because of any dispute. Included in this category were all types of jurisdictional quarrels of whatever nature. The industry members of the conference as well as the general public accepted those pledges at their face value and assumed those pledges were given by those having authority to carry them out. There is a dispute at the Frigidaire plant of General Motors, Dayton, Ohio, involving the United Electrical Radio and Machine Workers of America CIO and Building Trades AFL. Since the morning of July 17, 252 AFL building tradesmen have been on strike and in spite of requests made by unanimous resolution of War Labor Board have refused to go back to work. As employer members of the War Labor Board who participated as industry members in the December conference we are now publicly calling upon you twelve gentlemen to carry out the pledges given at the December conference.

Nor were the employer members the only ones who were aroused by the situation. Dean Morse had already mentioned in this connection that there were laws which punished treason; and the Board on July 25th voted, with the labor members dissenting:

> BE IT RESOLVED, that the War Labor Board calls the attention of the AFL and the CIO to the fact that jurisdictional disputes during the war period should be settled by machinery set up by the two labor organizations. Whenever the two labor organizations fail to settle without delay a jurisdictional dispute that has led to a stoppage of work,

[50] *E.g.*, Kingston Products Corp., *supra* note 49.

[51] *E.g.*, White Construction Co. (June 11), a contest between an AFL union and an unaffiliated union. Award by E. E. Witte, June 27.

[52] *E.g.*, Kelly Springfield Engineering Co. (July 20), a contest between AFL unions and a CIO union. Award by W. G. Rice, Jr., July 23.

the War Labor Board will appoint an arbitrator to render a decision, which decision shall be final and binding on the parties.

While this particular case was settled by the termination of the strike after the CIO had completed the disputed work and by the reference of the controversy to the War Production Board's board of review, there is no reason to think that the Board's resolution will be idle long.

DISSENTS AND DEFAULTS

In taking stock of the Board's divisions of opinion, it is plain that, apart from these formal dissents in demarcation cases and an occasional dissent by representatives of the defeated group in cases in which the AFL and the CIO have had conflicting interests, all the dissents by labor have concerned wages, while all but two of the dissents of the employer members have been protests against imposing maintenance of union membership as a condition of employment. Twice employers voted against wage awards—once against lessening a north-south differential,[53] once against maintaining an existing 50% night shift differential.[54] All public members of the Board have been in the majority in every part of every case, except that, in the initial *Aluminum* case, Morse voted with the labor members for a night shift differential of larger amount than was ordered.

The rate of rendering decisions is increasing steadily. So is the rate of receiving cases. So, it must be admitted, is the frequency of instances of work stoppage apparently designed to force certification. Thus the Board faces new problems of quantity and of kind and may have to meet them by changes in procedure and organization.

Another disquieting fact is that the roster of current cases—*Allis-Chalmers, John A. Roebling's Sons, Cornell Dubilier, Aluminum Company of America, Bethlehem Steel (Shipbuilding Division), Phelps Dodge Copper Products, Western Pennsylvania Motor Carriers* (formerly *Labor Relations*) *Assn., Breeze Corporations, Standard Tool*—sounds too much like the first 50 cases before the National Defense Mediation Board. Apparently much that was rated construction in 1941 turns out to be only maintenance; there must be new expenditures of governmental energy to recement relations at the expiration of the 1941 contracts.

CONCLUSION

Despite its delays and disagreements the National War Labor Board is serving an essential function in the country's mobilization of resources and it is discharging its duties and utilizing its opportunities in a way which is winning growing respect from the parties and the public. No order has as yet been questioned by any legal proceedings.[55] Only one final[56] order has been flouted; the Toledo, Peoria, and

[53] Aluminum Co. of America (Feb. 10). [54] W. J. Conners Contracting Co. (June 17).

[55] The Inland Steel Co. has stated that it intends to sue to test the Board's authority to order maintenance of membership in the "Little Steel" decision.

[56] Several interim orders met with resistance temporarily, *e.g.*, Federated Fishing Boats of New Eng-

Western Railroad Co. refused to comply with the Board's order of February 27 to arbitrate. Thereupon by order of the President the Office of Defense Transportation took over and operated the road. Thus the President confirmed the Board's authority to require arbitration. And, as has been seen, the Board has since required arbitration or required parties to contract to arbitrate future disputes in enough cases to establish compulsory arbitration as a settled part of the Board's jurisprudence. Agreeing to settlement of all labor disputes by peaceful means is agreeing to have them settled by the Government if settlement by the parties fails. And whether the settlement be made by the Board itself or by its appointee-arbitrator or by an arbitrator appointed through other channels upon order of the Board, the nature of the settlement is the same. In all of them consideration by the Board, that is, by a tripartite agency, is a step at some stage of the procedure. And if the Board sees fit to condition all arbitral awards on confirmation by the Board, then consideration by a responsible public agency becomes the final step to the conclusion.

In this as in other matters the Board is developing a common law of labor relations for wartime, which can hardly fail to have profound permanent effects.

POSTSCRIPT

After the completion of this article on August 3, the Board's orders in *General Cable Co.* (Bayonne, N. J.) and *S. A. Woods Co.* (Boston, Mass.) required presidential support. In the former case the employees struck because the Board denied a wage increase. The President put the Navy in charge. Selective Service deferments of employees were ordered cancelled unless work was resumed at once. The strikers immediately voted to return to work. The management was not displaced and the nominal control of the Navy was withdrawn after a few days. In the *Woods* case the employer notified the Board that it would not carry out the Board's union membership maintenance order. The President put the Army in charge and production continued under the active control of the Army.

Other noteworthy events of the last four weeks of August are: (1) the north-south differential was left unchanged in the textile cases (Aug. 21);[57] (2) the involuntary checkoff (over employer dissent on this and also on maintenance of membership) was ordered in *"Big Steel"* (Aug. 25) following the pattern of *"Little Steel"*; (3) the Board required equal pay for equal work where women replaced men in *Norma-Hoffman Bearings Corp.* (Aug. 24);[58] (4) in *Cambridge Tile Mfg. Co.* (Aug. 12) Dean Morse again disagreed with his public colleagues and joined the labor group in favoring a night shift differential denied by the majority;[59] (5) in *Norma-Hoffman Bearings Corp.* (Aug. 24) the Board's opinion defined the basis of granting maintenance of membership—that "it will result in industrial harmony and increased cooperation" and that "the Union is a responsible organization capable of

land (February), General Motors (May), General Motors Frigidaire (July), in effect a loud demand for reconsideration.

[57] Compare note 46, *supra*.

[58] Compare note 42, *supra*.

[59] Compare text following note 54, *supra*.

fulfilling all of its obligations to its members, the management, and the Board," and in *Monsanto Chemical Co.* (Aug. 27), quoting this latter language, it unanimously followed a unanimous panel recommendation against union security of any form because the local union leadership and membership had violated its no-strike pledge; (6) the Board's decision in *Pioneer Gen-E-Motor Co.* (Aug. 31) indicated the hardening of the union security mold, for the company having had for several years closed-shop agreements with a union representing its employees and, upon their voting a change of representation, having refused to make a closed-shop agreement with the new bargaining agent, and the panel having unanimously recommended maintenance of membership to take effect immediately, the Board ordered membership maintenance effective after 15 days, that is, merely the usual provision.

THE FAIR LABOR STANDARDS ACT IN THE WAR ECONOMY

PHILIP B. FLEMING*

The increasing rate of technological change over the last century has profoundly affected every aspect of life, including the art of war. Indeed, war constantly becomes less of an art and more of a science.

The modern soldier is not a Sir Galahad riding forth in shining armor to single-handed combat. He is a technician. If properly trained for his task he will have expert knowledge of one or more complicated mechanical devices—the internal combustion engine, the radio transmitter, the camera, the airplane detector. As a matter of course he will be familiar with one or more pieces of ordnance, know how such instruments function and how they are constructed. He will have some knowledge, ranging up to expertness, in one or more technical fields—chemistry, aerodynamics, hydraulics, meteorology, road and bridge engineering, camouflage. At no previous time in history has so much in knowledge and skill been demanded of the patriot. As a consequence, the work of war touches our whole civilization, especially at the points where it is most complex. All sorts of intricate devices must be manufactured in great quantities, for almost everything modern technology can produce is useful in all-out conflict.

The American Civil War has been called the first of the modern wars. It was modern in the sense that it foreshadowed the development of many technical devices (the ironclads Monitor and Merrimac are examples) that since have come into general use, and also because it came to involve something approaching a total effort on the part of rival economies. For each man at the front in 1861, the labors of two or three men behind the lines were necessary. Accelerating technological change had greatly increased the ratio by 1917. The process has continued. If we assume an eventual American Army of seven or eight million men, it is obvious that the entire civilian adult population must be geared into the war effort in some degree, especially since we must also assist in equipping the men of the United Nations allied with us in the present undertaking.

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I.

Because all of us, whether fighting at the front or working at home, are involved, to speak of the position of labor in our war economy may mislead by implying a distinction where sharp distinctions do not exist. With the entire population engaged, the civilian problem is to achieve and maintain those processes and attitudes that best promote maximum production of needed goods and services. This is true because a democracy which is fighting to maintain a free economy must rely to a very large extent upon the willing cooperation of its citizens. Methods of coercion and compulsion, which proved so successful in Germany in the first two years of the war, obviously are not available to us. We cannot use them without giving hostages to the enemy, without emptying our declared purpose of its essential meaning.

Labor unions were suppressed in Germany before the war. Since 1939 drastic controls of various types have been intensified and extended over the activities of the ordinary citizen. He is told where, when, and how long he must work and the wage he will receive. He has little or no choice in the matter. In the early stages of an offensive war, close regimentation of this sort possesses decided advantages over the slower and less "efficient" processes of democratic free enterprise. The German worker's distaste of compulsion is partially compensated by the lift imparted to his morale by a rapid succession of relatively inexpensive victories in the field. It remains to be seen how he will react in a time of reverses when victories are no longer easy, quick, or inexpensive.

That the free worker bears up well under military adversity is proved in Great Britain where morale has survived many reverses, and has even grown in intensity under the pounding of long-sustained air raids.

While some measure of control is essential in war time even in a democracy, it must be fashioned primarily to encourage each to make his maximum voluntary contribution. When controls become too intolerable to be borne, the free worker, by his participation in the governmental process, can relax or modify them, a method of redress which is closed to the citizen of the totalitarian state.

Unhappily, there are in the United States those who secretly admire the superficial, though short-term, "efficiency" of Fascism and who would like to apply its techniques to our war effort. And there are some who see that the struggle over the division of the national income as among ownership, management, and labor is far older than the conflict of arms in Europe and Asia and who expect it to continue long after the war has been fought to its conclusion. They are reluctant to see introduced new factors that threaten to disturb present arrangements respecting the division of income, and on both sides of the domestic conflict a few would take advantage of the national emergency to strengthen their own position.

Actually, if we accept the overwhelming importance of winning the war, there should be no spoils to divide. Neither labor nor industry can expect anything but slavery if we lose, and, therefore, any contribution which must be made toward winning the war is a proper democratic contribution. It should be said in all fairness,

however, that the great majority of employers are not now finding fault with labor. They have learned by experience that the demands of workers are not always unreasonable or necessarily unpatriotic. They know that differences, given a spirit of mutual understanding and good will, yield to negotiation.

A tragic disservice has been rendered the Nation by those who have sought to use the divide-and-conquer technique against labor. Our problems are so great and pressing that there can be no hope of solving them satisfactorily until we apply to them our best intelligence. Emotion will not do it.

The unthinking or the irresponsible have released much propaganda intended to foment discord among the workers themselves, to divide the public in its attitude toward labor, and even to turn the soldier at the front against the worker at home by emphasizing the disparity of condition between the private fighting for $21 a month and the worker earning a dollar an hour and time and a half for overtime. The fact that, in addition to his $21 a month which has since risen to $50, the private receives shelter, food, clothing and medical attention is not irrelevant but is seldom mentioned. Moreover, an unavoidable disparity between the soldier and his brother at home has existed in every war. What needs to be stressed is that today's citizen-soldier ordinarily is but a worker in uniform, that his father and brothers at home also are workers, and that, since he eventually must return to his former status as an employee of industry, he has a very great personal stake in the maintenance of proper labor standards.

Strikes are expensive at any time, but little effort is made during war to analyze and eliminate their causes. An example of unquestioning acceptance of propaganda against labor may be found in the widespread publicity that accompanied an alleged strike of shipyard workers on the West Coast early in the year.

The workers had a collective bargaining agreement calling for an eight-hour day and time and a half for overtime. The employer desired to introduce two ten-hour shifts. The workers alleged the existence of a considerable supply of unemployed shipyard workers in the community and contended that the employer should put three eight-hour shifts to work, an arrangement which would have resulted in 24 hours of production daily instead of the 20 which the employer demanded. If the position of the workers was valid, more man-hours would have been worked under the arrangement they suggested, but virtually no effort was made to ascertain for the public the truth or falsity of their argument. Their refusal to work the ten-hour shift was widely represented as a strike little short of treason and another example of unconscionable grasping for additional benefits. Actually, under the three eight-hour shifts proposed, workers' pay would have been decreased by the cancellation of overtime.

2.

Organized labor entered the First World War with about half of its present numerical strength. The 48-hour week was coming into general acceptance, and the official policy of the Government, as expressed by General William Crozier, Chief of

Ordnance, in his famous General Order 13, was for the retention of all safeguards that had been built up for the protection of the workers.

Wage rates went up and earnings rose even more sharply because of overtime pay. On the whole, it was a lush period, even though living costs also were rising. Workers wandered about from plant to plant in search of more and still more overtime work. The confusion was so great and the chaotic turnover so detrimental to productive efficiency, that the War Labor Policies Board finally was driven to consider the necessity for universal wage stabilization, but peace intervened before action in that respect was taken. The silk shirts frayed out in the post-war wash, when overtime work was discontinued and earnings were sharply curtailed. Living costs were still rising, and labor then discovered that its gains had been largely ephemeral. On the whole, the workers emerged from the war in a worse position than when they entered it.

With history showing signs of repeating, it is highly desirable that wage stabilization in the present war should be no longer deferred. It is all the more essential because labor has voluntarily relinquished the right to strike, and the War Labor Board of necessity must have some wage standards for its guidance in settling disputes.

Wage stabilization is not to be confused with wage freezing, which some have advocated. To freeze the wage structure at existing levels, or at a level existing at some prior date, would mean the freezing of inequalities and injustices also. It would freeze wages which are admittedly much too low, as well as those which may be considered to be too high, or high enough. It would accentuate a natural dissatisfaction among workers occasioned by the fact that men doing identical work in different plants, and sometimes in the same plant, are being paid at different rates. The need is for a type of stablization that will first bring up the lower-paid workers to a living wage, put an end to wage discriminations among men doing similar or identical work, and provide for future adjustments when necessary to compensate for increases in the cost of living.

As long ago as January, 1941, I suggested that the industry-committee mechanism of the Wage and Hour Law might very well be utilized to bring about stabilization without the necessity for the creation of additional administrative machinery.

That statute,[1] it will be remembered, sets a present minimum wage of 30 cents an hour for employees engaged in interstate commerce, or in the production of goods for interstate commerce, with a 40-cent minimum to become generally effective October 24, 1945. To permit such industries as can do so, without substantially curtailing employment, to adjust to a minimum higher than 30 cents (but not higher than 40) before 1945, the Administrator is required to issue industrial wage orders from time to time upon the recommendations of industry committees.[2] Each industry committee, appointed by the Administrator, must include in equal numbers representa-

[1] 52 STAT. 1060 (1938), 29 U. S. C. §§201-210.

The Summer, 1939, issue of LAW AND CONTEMPORARY PROBLEMS (Vol. VI, No. 3) was devoted to a symposium on "The Wage and Hour Law." ED.

[2] Provision is made for wage orders in §8 of the Act. 29 U. S. C. §208.

tives of the public and of the employers and employees in the industry concerned. The committee is required to study economic and competitive conditions in the industry for which it serves, and the Administrator is required to make available to it such data as may be in his possession bearing upon the problem, the committee may call upon him to submit additional data, and it may subpena witnesses and documents and undertake independent studies of its own. Generally, the 40 or more industry committees that so far have made wage recommendations have had access to the studies of the Wage and Hour Division's own economists, of the Bureau of Labor Statistics and other governmental agencies, and have had before them materials submitted by trade associations, labor unions, and by individual employers and employees.

The deliberations of the committees are not wage negotiations or arbitration proceedings, in the ordinary sense. They are fact-finding proceedings and the conclusions and recommendations must be of such a nature as to meet the test of public hearings before the Administrator and possible later challenge in the courts.

With two or three exceptions, all the wage orders issued in accordance with this process have been accepted as generally satisfactory by both the employers and employees directly concerned, and every wage order that has been challenged in litigation has been upheld by the courts.

The problem of recommending defensible maxima differs from that of establishing minima in degree but not in kind, and the industry-committee technique would seem to be admirably suited to the purpose.

From a system of equitable wage stabilization, if combined with adequate price controls or rationing, we should expect a number of benefits: interruptions of production in war plants due to labor turnover would be greatly reduced; "pirating" of workers from plant to plant would be discouraged; dissatisfaction and discontent among workers because of inequalities would be greatly moderated; and finally both labor and industry would be in a far better position to face inevitable post-war readjustments.

3.

The recent attack upon the Wage and Hour Law, in my opinion, was detrimental to that national unity which we all concede to be essential in war time. The nature of the law was so badly distorted by its enemies that many patriotic persons were utterly confused. It seems necessary to point out again that the law sets no limit to the number of hours that may be worked in one day or in one week. Its only requirement as to working time is that, if the covered employee works more than 40 hours in one week, he shall be paid for the excess at time and a half the regular rate at which he is employed. The purpose of this provision was not, as some have supposed, to increase the earnings of the individual employee, but to spread the work, since straight time is cheaper than overtime.

To point out, on the one hand, that the provision has had the effect of increasing employment, and, on the other, that it has not prevented long hours of work in

essential war industries, involves no necessary inconsistency. What obviously is happening is that in those plants in which additional workers can be trained and absorbed, they are being employed; in situations in which overtime work cannot be avoided, longer hours are being worked.

The Bureau of Labor Statistics reports that in January of this year, 89.2% of the plants in the aircraft industry (including engines and propellers) were working 100 hours or more; as were 98.5% of blast furnaces; 92.8% in brass, bronze and copper products; all chemical plants, all engine plants (other than aero); 71.4% of machine tool plants, 79.4% of machine tool accessory plants, 85.1% of the ordnance plants, 86.2% of shipbuilding yards, 97.8% of smelting and refining plants, and 69.1% railroad cars and locomotive plants. A majority of all plants in primary war production were working more than 100 hours a week, and a very large number had reached or exceeded 160 hours a week. In the latter category were 37.5% of the airplane plants, 30% of the aluminum plants, 80.3% of the blast furnaces, 53.6% in brass, bronze and copper products, 85% of the chemical plants, and a third of the shipbuilding yards.

Such schedules, of course, were made possible only by the use of multiple shifts.

Average hours worked by individual workmen had achieved new high levels in the first half of December, 1941, according to the Bureau. The period covered by the survey includes the week before the attack on Pearl Harbor, and a week or more thereafter, but the report does not reflect the entire impetus to the productive effort following our entrance into the war. The average hours worked per week in some leading war industries during the period covered, follow:

Industry	*Average hours worked per week*
Fire arms	52.5
Machine tools	53.8
Machine tool accessories	54.1
Engines and turbines	49.9
Textile machinery	48.5
Forgings, iron and steel	47.1
Explosives	47.0
Cars, electric and steam railways	42.4
Locomotives	46.7
Foundries and machine shops	46.3
Aircraft	46.2
Shipbuilding	46.0
Aluminum	45.7
Electrical machinery	44.7
Brass, bronze and copper products	44.5
Ammunition	44.1

Source: Report of Bureau of Labor Statistics for the first half of December, 1941.

These figures represent an understatement of the hours worked by many individuals in the industries to which they refer, since they include data for those who did not need to work overtime, as well as for those who worked 60, 70, or even more hours a week.

A more accurate picture of the hours situation is afforded by the following table,

which shows the percent of employees working overtime in January, and the average number of hours worked by those working overtime:

Industry	*Percent working overtime*	*Average hours of overtime worked weekly by those working overtime*
Aluminum manufactures	57.2	9.9
Blast furnaces (steel)	28.1	9.3
Brass, bronze and copper products	68.0	10.4
Cars, electric and steam railways	43.1	11.4
Chemicals	18.4	8.7
Copper mining	76.2	10.6
Electrical machinery	62.4	10.0
Engines (except aero)	66.5	14.3
Locomotives	91.2	12.8
Machine tool accessories	95.9	15.9
Ordnance (primary)	75.2	11.3
Ordnance (miscellaneous)	60.4	10.5
Shipbuilding	91.2	12.3
Smelting and refining	25.6	7.3
Trucks	45.7	9.1
Washing machines	77.8	9.5

Source: Data compiled by Bureau of Labor Statistics, January, 1942.

All of the overtime indicated in the table was paid for by at least time and a half, as required by law, and in some instances, where required by collective bargaining contracts, at even higher rates.[3]

It has been argued that while employers may have paid the overtime rates cheerfully enough, it is the taxpayer who suffers in the long run, since the higher labor costs are passed on to him. This is true only where contracts have been let on a cost-plus basis or contain "escalator" clauses. It is not true where contracts are let on a fixed-price, or lump-sum, basis and contain no provision for adjustment to cost changes occurring after signing of the contracts. The majority of contracts, both in number and in dollar value, are in the latter category, and in such instances the abolition of overtime payments would not have resulted in lower costs to the taxpayer. But even if it could be shown that the taxpayer would benefit in every instance from the abolition of time-and-a-half pay for overtime work, the more fundamental question of broad, social policy would still remain unanswered.

The ability of employers to pay time and a half for overtime is not irrelevant, but it figured little in the Congressional debates. On the actual situation here another study made by the Bureau of Labor Statistics throws revealing light. The study embraced costs, prices and profits of 260 corporations in 26 defense industries whose combined 1939 sales amounted to $11,234,000,000. It was found that an increase in working hours by 20% above those actually worked in 1939, with full overtime wages, and conservatively assuming only a 16% increase in production, would have increased the combined earnings of the 260 corporations by $75,284,000 all other

[3] It was not until March that labor voluntarily relinquished double time for Saturday, Sunday and holiday work where contracts had called for such compensation.

factors remaining constant.[4] "These conclusions," the Bureau reported, "are based on the fact that the payment of overtime rates under the Fair Labor Standards Act is more than counterbalanced by the increased utilization of plant facilities and the absorption of fixed overhead expenses in a larger volume of production."

In nine of the 26 industries the effects of overtime rates as calculated indicated a decline in return to business investment, but "the methods used in the calculations were exceptionally conservative and the changes in the return or in the gross manufacturing profit were not large enough to exceed the range of probable error of the data employed."

The gross margins on sales of aircraft reported for 1939, for example, were $51,544,000. Eight additional hours, despite the payment of time and a half for the overtime, would have increased the gross margins by $1,208,000. In machine tools the increase would have been $336,000; in men's, youths' and boys' clothing, $662,000; in machinery, not otherwise classified, $668,000; in petroleum producing and refining, $50,044,000.

An incidental, but important, additional effect of placing a floor under wages is that it provides an incentive to the employer to improve his operating efficiency. When other than labor costs rose an adjustment frequently made by management was to resort to compensatory wage reductions. The effect of establishing irreducible wage minima, either by law or collective bargaining, is to foreclose this method of readjusting the balance and to intensify the search for other economies.

If legislative relaxation of the overtime provision were fully effective, the result would be to reduce the wages of every man in the war industries working more than 40 hours a week. But since the vast majority of the employees in war goods plants are working under collective bargaining contracts that call for time and a half for overtime, these organized workers would not be affected, unless it is assumed that new contracts would be negotiated. In that case it is most probable that the new contracts would call for higher hourly wage rates, in order that the total weekly wage might remain approximately the same as at present. Otherwise, employers would experience considerable difficulty in attracting workers from consumer-goods industries to war industries. There is much evidence to indicate that the vast majority of the employers concerned have no desire to reopen union contracts for further negotiation at this time. They would prefer to pay the overtime at the legal rate, since they realize that after the war it will be far easier to abolish overtime work than to reduce hourly rates.

Extra payments for overtime work are of additional advantage to the employer because they enable him to attract labor from more distant points. The worker who, for example, removes from Kansas to work in a Pennsylvania munitions plant, is under considerable expense for transportation. He would be much less inclined to move, and thus conversion to an all-out war effort would be retarded, were it not for the fact that increased earnings due to overtime compensate him for the additional expense. Many employers have found such workers much more willing to work long

[4] *Overtime Pay in Relation to Costs and Profits* (1941) 53 MONTH. LAB. REV. 8.

hours of overtime than those in nearby areas. The latter, already well integrated in the community, usually prefer leisure above 40 or 48 hours a week to the additional wages that come from a workweek of 60 or 70 hours. The stranger, especially if temporarily separated from his family, has fewer opportunities to spend his leisure profitably or interestingly.[5]

The extent of the wage cut that men working very long hours would experience if overtime pay were abolished may be illustrated by the case of a man who in March wrote to the editor of the St. Louis *Post-Dispatch* as follows:

> In regard to the controversy on the repeal of the 40-hour-week law that industry and some Congressmen are asking for, I am one who, since the emergency began, have been working 71 hours a week—eleven hours a day and eight hours on Saturday and Sunday, night work to boot.
>
> I am termed a machinist. I am required to furnish my own precision tools, which are very costly. For this 71 hours a week I receive $68 a week.
>
> My four children scarcely recognize me, as I only see them for an hour on Sunday.

For the purposes of his letter this man may have rounded both the hours worked and the wage earned. But accepting the letter at face value and assuming that its author is being paid in accordance with the law, his base rate is 78.6 cents an hour. For each hour over 40 he is being paid once and a half that rate, or $1.18 an hour. Eliminate his overtime pay and his weekly wage is immediately cut from $68 to $55.82. To me, at least, this does not seem to be the course best calculated to make better patriots of our working people, put an end to labor unrest, prevent strikes, and get the goods to the firing line more quickly and abundantly.

Although the National Association of Manufacturers opposed the enactment of the Wage and Hour Law and has done some criticizing since, it is interesting to note that not even from that source did the advocates of suspension obtain support. According to newspaper accounts, Mr. William P. Witherow, N. A. M. president, "apparently surprised some members of the House Naval Affairs Committee when he testified that there was a lot of difference of opinion within his organization as to whether suspension of time-and-one-half payments after 40 hours in a week would accelerate or retard the output of war materials. Mr. Witherow, head of the Blaw-Knox Company, a Pittsburgh steel concern with many war contracts, said that whether the 40-hour standard week should remain or go was, after all, an issue between the government and the taxpayer."

During the two years I was Administrator of the Wage and Hour Division of the Department of Labor I received not more than four or five letters from manufacturers complaining that the time-and-a-half requirement for overtime was working to curtail production of war goods. I had urged employers to strive for greater output not by lengthening the working week but by employing additional help and, wherever possible, by adding additional shifts so that plant and equipment could be operated 24 hours a day and seven days a week. This was in line with what

[5] In April plants in the New York area making war goods were advertising for skilled workers in the classified columns of the New York Times. Most of the advertisements stressed "plenty of overtime" as among the attractions.

Mr. (now Lieutenant General) William Knudsen also had advocated. While those few complaining employers had protested that, for one reason or another, they could not put on additional employees, or increase the number of shifts, subsequent investigation showed that nearly all of them finally had made such adjustments and found them to be satisfactory.

4.

The analogy some have attempted to draw between the Fair Labor Standards Act and the French 40-hour law has been so often discredited that I shall touch upon it very briefly and only because the argument occasionally continues to be used.

The French 40-hour law was instituted by the Blum Popular Front Government in June, 1936. It was so drawn and administered that in actual operation it tended to discourage any overtime work whatever. While provision was made whereby labor employed in defense industries could be worked longer than 40 hours, administrative difficulties were such that labor inspectors were inclined to discourage such exceptions. In effect the application of the law tended to limit hours of production as well as the hours of the individual worker. When management had used up its 40 hours, the doors of the factory were locked and everybody went home for the remainder of the week. The use of additional shifts, so that production would proceed around the clock, was difficult. Since the law required that the worker should be paid the same weekly wage for 40 hours as he previously had received for 48 hours, labor costs were increased to the employer by about 20%.

Even so, Pierre Cot, former Air Minister in the French cabinet, is authority for the statement that, during the two years the 40-hour law was in effect, factory output increased over the level it had reached immediately before the law was enacted and was considerably higher than that attained immediately after it had been discarded.

But, in any event, the Wage and Hour Law differs from the French law in that it imposes no limit upon either the worker's hours or factory hours. It does not add to labor costs unless overtime is worked. It does not discourage additional employment or the utilization of additional shifts; on the contrary, it encourages re-employment and the use of multiple shifts.

It also has been assumed and argued that British industry is producing under no such limitations as those involved in the Fair Labor Standards Act. While it is true that British workers generally are working longer hours than American workers, it is also true that British labor is being paid extra for hours worked beyond what was the normal workweek in peace time. This, extra pay for extra work, is no less than is required by our Wage and Hour Law.

Working hours were greatly lengthened after the debacle at Dunkirk. In August, 1940, however, they were reduced by order of the Ministry of Labour which had found output beginning to decline. A wealth of literature from the last war testifies to the deleterious economic and social effects of too long hours of work. Only for the more robust workers was the 60- or 70-hour week actually achieved. Others lost many hours because of sickness induced by fatigue. Accidents increased and long

hours signally failed to maximize production. Britain's experience in the present war affords an abundance of the same sort of evidence. Some lessons are learned very slowly and painfully.

In Germany, where hours were lengthened and overtime pay was abolished early in the present war, results were equally unsatisfactory. The Government charged sabotage and dealt most harshly with the suspected saboteurs without improving production. It was not until the repressive measures had been somewhat relaxed, hours had been shortened, and pay for overtime was restored that the situation improved.

The experience of every industrial country shows the maintenance of some labor standards to be imperative in time of war.

Given adequate training programs, and with so large a potential labor supply as we undoubtedly possess, it is altogether unlikely that we shall arrive at a point within the predictable future where general relaxtion of existing hours requirements in the United States will be necessary.

5.

Since the success of a democracy in war depends upon the willing and voluntary cooperation of all elements of the population, repressive and coercive measures must be avoided wherever possible. As respects labor, it is necessary that it should not be embittered by the knowledge that other groups in the community are improving their economic position at the workers' expense. Social gains must be preserved—which is to say that the emergency must not be allowed to become an excuse for upsetting the balance of power between workers and employers previously sanctioned by law or worked out by mutual consent.

Embittered and resentful labor will not make a contribution to the war effort on the level of maximum effectiveness. The worker must have cause to feel that the declared objectives of democracy are real and that he himself has a large stake in the outcome. This means that he and his wife and children must be assured of the reasonable, basic satisfactions of life. It means that they must be housed in decency, even though Government must step in to supplement the housing efforts of private builders. It means that adequate provision must be made for the health of the worker and his family and that schooling must be supplied for his children. These are minimum essentials.

In time of wars and jangled nerves it is natural to seek out and stigmatize scapegoats for manifest national shortcomings. We must be on guard against the attempts of those whose eyes are much more on the perennial struggle for power and privilege than upon the trial at arms to nominate our scapegoats for us.

We cannot win without miracles of production, and we cannot achieve such miracles without the wholehearted cooperation of ownership, management, and labor. Whoever foments division among them now is rendering aid and comfort to the enemy.

RESTRICTIVE WARTIME LABOR MEASURES IN CONGRESS

MAURICE WINGER*

Of significance in the history of laws enacted and policies adopted are the measures which fail of passage. Not only do the bills which proliferate in times of stress indicate the contemporary climate of opinion but also they tend to shape, by indirection, the provisions which ultimately emerge in new statutes, the course of executive action, and even the trends in group and individual activity. Accordingly, at this time, when the labor policy of the Federal Government has taken a new departure, a survey of the measures designed by their sponsors to bridle the power of labor organizations, particularly in its relation to the war effort, may well contribute to the understanding of current and subsequent developments in this field. With that end in view, this survey seeks first to trace the interrelation between the dramatic events of the past two years and the appearance of new proposals on Capitol Hill and then to consider the bills which have been introduced in Congress during this period. Because of the number of measures proposed, it has been found convenient to group the individual measures for consideration according to the degree of success they attained. Thus those which prompted no specific action of any kind are first set forth briefly in order to show the range of plans conceived. Following this, the measures which received serious consideration are discussed according to the three main classes into which they fall. In conclusion, the Smith-Vinson bill is taken up in detail because it not only approached closer to enactment than the others but also because its provisions are so various as to cut across any scheme of classification.

THE IMPACT OF EVENTS

Though the recent agitation over this popularly-termed "anti-labor legislation" is still fresh in mind, its beginnings antedate the defense program as well as the war effort. In fact, rumblings of events to come could be detected in the investigation of the National Labor Relations Board and proposed amendments to the NLRA as early as 1939 and early 1940, but only in a report filed by Mr. Hoffman of Michigan, supported by a numerically weak minority were really extensive amendments advocated. For the majority of the House Committee on Labor reporting on proposed amendments, and even for the preceding Smith investigating committee, the prin-

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cipal issue was the fairness of the Act and its administration, particularly as to the determination of the proper bargaining unit—the bone of contention between AFL and CIO.

It is significant that even in 1940, with the national will as yet deeply divided regarding the still European conflict, news sensations such as the Vultee Aircraft strike brought forth a flurry of verbal response in Congress. However, this was a relatively isolated instance of a truly dramatic work stoppage; the report of the Smith committee, after long hearings investigating the NLRB, caused no major Congressional reaction. The report was charged with distortion of the facts; the Smith amendments received little serious consideration; and when Secretary Perkins' annual report in January 1941, showed a decrease in strikes, the issue began to look moot, if not academic, to a Congress busy with a lend-lease proposal.

However, January, 1941, also brought the beginning of the Allis-Chalmers strike in Wisconsin which caught and held public attention and was undoubtedly responsible for many proposals in Congress. February saw the defeat of an attempt to tack onto the lend-lease bill an amendment suspending New Deal labor laws. Later in the month, Republicans unsuccessfully sponsored a rider to an appropriations bill barring the closed shop. Indicating a widespread sentiment, the Senate of the State of Georgia passed a law barring the collection of union fees from defense workers.

Confronted by the continuance of the Allis-Chalmers strike into March, William Knudsen, wielding considerable influence as head of OPM, reversed an earlier position. In a letter to Chairman Sumners (Dem., Tex.) of the House Committee on the Judiciary, he urged legislation to curb strikes by providing for a cooling-off period.

On March 4, the House Committee on the Judiciary heard Under-Secretary of War Patterson advocate, with the approval of Sidney Hillman of the OPM, an agency similar to the First World War Labor Board. OPM began work on such a plan while ex-Ambassador to France, William Bullitt, in testimony before the same committee, analogized the United States with its Allis-Chalmers strike and other defense stoppages to pre-invasion France. With tension at a peak, President Roosevelt created the National Defense Mediation Board on March 20. Two days later hearings were set for the House Naval Affairs Committee to consider the Vinson bill which, at that time, purported merely to give statutory authority to the Mediation Board in regard to naval construction industries. Congressional friends of organized labor appealed for cooperation to avoid legislation, but before the Allis-Chalmers strike was finally settled by acceptance of the Mediation Board recommendations, plus a faintly veiled threat to use federal troops, a substantial number of new proposals of varying extremes were introduced in Congress and those already pending received much more serious consideration. Even President Roosevelt indicated that the trend was toward a compulsory cooling period for industrial disputes.

However, before the end of March, the crisis passed; testimony before the House Military Affairs Committee was consoling and, with the initial successes of the

Mediation Board, the Administration policy shifted to "soft talk." During May the tension eased further, although the Gallup poll showed a reaction favorable to cooling period proposals. Though the House Rules Committee, after postponing decision, finally gave the Vinson bill right of way to the floor, attention shifted to personalities with demands in the Senate for the resignation of Madame Perkins.

The North American Aviation strike in June whipped the smoldering coals back to white heat. Although CIO officials branded the strike a wildcat, the crucial position of the affected industry to national defense stirred public opinion to the depths. General Hershey, with Administration approval, obviated some pending legislation by directing draft boards to reclassify for immediate service striking registrants who had been deferred for essential service, and boards reclassified strikers who refused to return to work after the Army Air Corps seized the North American plant. A new flurry of bills appeared in both houses, and strike curbs actually passed the House as riders to the War Department supply bill although they were eliminated in the Senate. On the other hand the plant-seizure bill introduced by Senator Connally (Dem., Tex.) passed the Senate with amendments.

During the summer the strike picture again improved so that when the Connally-May bill finally came out of conference and was passed in August, the labor provisions had been entirely eliminated in line with Administration desires.

Conditions were so much improved in September that there was even a pause for retrospect and recrimination during which the AFL claimed credit for killing the measures while blaming the CIO for their appearance in the first place.

The strikes at Air Associates, Inc., in October shifted the emphasis from labor to management. The Mediation Board accused the company officials of non-cooperation and, when President Roosevelt ordered the plant seized on October 31, sentiment, by and large, was with the strikers. Concurrently, however, this gain for organized labor was more than offset by the dramatic captive coal mines dispute, and Lewis' defiance of the President. Anti-labor reaction throughout the Nation was so severe that, in addition to offering new bills, many southern Congressmen refused support to the Administration's foreign policy during the crucial debate on repeal of the Neutrality Act unless President Roosevelt would agree to make a definite strike proposal. The subsequent close vote has been attributed to the indefinite response made by Administration leaders.

It is probably not too much to say that the captive coal mines dispute passed the Smith-Vinson bill (which will be considered in detail) although its passage was aided and abetted by strikes at Consolidated, Lockheed, and Vega and by threatened sympathy strikes in almost all aircraft plants on the West Coast. However, when the CIO members killed the Mediation Board by resigning on November 12 in protest over the Board's decision in the captive coal case, the strong argument that voluntary methods should be given more time was lost.

Pearl Harbor interrupted the momentum which had gathered during the debates. The Senate committees agreed to postpone consideration of their labor bills pending

the conference of labor and industry called by President Roosevelt on January 2, 1942. When the conference failed to reach a complete agreement and President Roosevelt broke the deadlock on the closed shop issue by ignoring it and promising to set up a war labor board, agitation could scarcely be quelled completely. Senator Connally made plans to press his bill, now replete with labor curbs.

Nevertheless, the industry-labor conferences had succeeded in ruling out strikes, and strikes seem to have fired more public sentiment than any other aspect of the labor problem. Particularly after the initial successes of the newly-constituted National War Labor Board, labor issues might have lost their urgency but for a shift in emphasis which was given direction when the President pointed to the need for longer hours in his annual message to Congress on January 7, 1942. This note was caught up by some of the advocates of the older anti-strike measures; several wage-and-hour bills were introduced; and public opinion as evidenced by the Gallup poll, showed favor toward longer hours.

When labor voluntarily gave up double-pay provisions and the passing of time proved the relative effectiveness of the WLB, much of the ammunition for anti-labor legislation was removed although some Senators kept up the fight, especially in the form of wage and hour control. By the spring of 1942, emphasis had definitely shifted to inflation controls. Accordingly, after President Roosevelt's April inflation message in which he explicitly disclaimed desire or need for labor legislation of any type, both House and Senate committees dropped the pending labor measures, purportedly for the duration.

The vote was close, however, in the House Naval Affairs Committee where some pending measures still had staunch supporters. In the Senate Committee on Education and Labor, majority sentiment favored allowing the WLB a fair chance to prove its mettle without the confusion and pressure of imminent legislation. It seemed to be generally conceded that the continued success or failure of the WLB would determine the ultimate fate of the proposals to be discussed below.

THE SCOPE OF PROPOSED LEGISLATION

If proposals affecting wages and hours, which are beyond the scope of this survey, are included, well over fifty bills, concurrent and joint resolutions aiming at control or repression of labor were introduced in the last two years. In substance and scope, the measures range from comparative leniency to rigorous severity. Of necessity, most of them prompted no positive action, even at the hands of Congressional committees; however, the objectives of even these are significant.

On three occasions different sponsors offered bills in the House to define as treason all strikes impeding the progress of national defense during the national emergency.[1] Somewhat similar, if less drastic, was a proposal that it be a crime to prevent or interfere with the manufacture of necessary government implements or

[1] H. R. 4223, 77th Cong., 1st Sess. (1941) by Ford (Rep., Calif.) and H. R. 6057, *id.*, by Welchel (Rep., Calif.).

Unless otherwise indicated, all bills hereafter cited were introduced in the 77th Congress, 1st Session.

munitions.[2] Several bills sought to restrict the membership of labor unions, aiming particularly at excluding or disfranchising either the alien,[3] the revolutionist (usually specified as "those opposed to"[4] or "advocating the overthrow of"[5] the government of the United States), or the more general and inclusive labor racketeer.[6] A novel measure was introduced by Mr. Wickersham (Dem., Okla.).[7] It provides that any employees who fail to abide by the decision of the National Defense Mediation Board "shall be replaced by members of the military forces of the United States of comparable qualifications and with good records."

In the Senate, a constitutional amendment was offered "to prohibit denial of the right to work and forbid collection of dues from union members."[8] In the same vein, a Senate proposal would make unlawful "the use of force or violence or threats thereof to prevent any person from engaging in any lawful vocation."[9] Outright repeal of the National Labor Relations Act was advocated by Mr. Hoffman[10] in the House.

On a descending scale of rigor, other unfruitful bills would prohibit certain political contributions by labor organizations,[11] would seek to deprive employees engaging in wilful violence in labor disputes of their right to reinstatement under the National Labor Relations Act,[12] or would require draft reclassification of striking employees engaged in war production.[13] The latter was rendered unnecessary by General Hershey's order during the North American Aviation strike.[14]

By far the largest number, even of the unconsidered bills, centered around one method or another of mediation of labor disputes, authorization of plant seizure by federal troops, maintenance of the *status quo* in labor relations, or registration of labor unions. Each of these thoughts was embodied in various bills concerning which there were at least hearings and some of which were favorably reported out of committee and voted upon in one chamber of Congress.

THE PROPOSALS ACTED UPON

As might well be expected, the approach and attitude of the several Congressional committees involved shows a wide divergence. In the Senate, the Committee on

[2] H. R. 7582, 76th Cong., 2d Sess. (1939). This bill anticipated the spirit of things to come. It was filed on Oct. 12, 1939, by Hoffman (Rep., Mich.).

[3] H. R. 4406, by Woodruff (Rep., Mich.).

[4] H. R. 5035, by Ramsay (Dem., W. Va.).

[5] H. R. 5081, not listed by author in the Congressional Record's "History of Bills."

[6] S. J. Res. 64, by Reynolds (Dem., N. C.) and H. R. 6777, 77th Cong., 2d Sess. (1942) by Gibson (Dem., Ga.). The fate of H. R. 5580, by Landis (Rep., Ind.) is an exception among bills of this class. Though the House took no action, the bill was actually reported out favorably by the House Committee on Labor on March 13, 1942, H. R. REP. No. 1897, 77th Cong., 2d Sess., which stated that the bill's purpose was "to prevent subversive individuals from representing employees in labor unions." Such individuals were defined at length, and the Attorney General was given jurisdiction to determine subversiveness after notice and hearing. Chairman Norton (Dem., N. J.) dissented from the bill on the ground that the Attorney General disapproved it.

[7] H. J. Res. 247.

[8] S. J. Res. 106, by O'Daniel (Dem., Tex.).

[9] S. 1811, by O'Daniel, and also H. R. 1403 and H. R. 6069, both by Hoffman.

[10] H. R. 1404.

[11] *Inter alia*, in H. R. 4392, by Bennett (Rep., Mo.).

[12] H. R. 4637, by Halleck (Rep., Ind.).

[13] *Inter alia*, in H. R. 6826, 77th Cong., 2d Sess. (1942) by Colmer (Dem., Miss.).

[14] See p. 504, *supra*.

Education and Labor which has carried the bulk of the burden in that chamber, took a step making for orderly and systematic consideration when its chairman submitted a Senate resolution in May, 1941, calling for "basic data for the formulation of a policy toward strikes in defense industries in the United States together with facts as to the extent, duration, and severity of defense strikes, and the causes therefor; also a summary of the State and Federal law and jurisprudence which define the rights and status of labor insofar as they relate in any way to strike situations."[15] This useful document emphasizes, among other things, the extent to which states have already been experimenting in the field and the variety of approaches they have taken. Exponents of federal proposals have stressed the heterogeneity of these measures in advocating that uniform federal legislation supplant them by pre-empting the field.

To avoid a distorted picture, it should be mentioned that even in the midst of powerful agitation for restrictions on labor, proposals were also considered seeking to preserve and strengthen labor's rights and privileges. In fact, the long pending Oppressive Labor Practices Act, which was sponsored by Senator LaFollette (Prog., Wis.), passed the Senate in October, 1939. Although this bill died at the hands of the House Committee on Labor, legislation to benefit labor has also been initiated in that chamber.[16] Furthermore, LaFollette reintroduced the bill in the Senate in April, 1942, concurrently with the introduction of its counterpart in the House[17] by Mr. Sauthoff (Prog., Wis.). These measures exist as, *inter alia,* a counterthreat against restrictive labor legislation.

As has already been mentioned, the greatest number of bills which received serious consideration involved union registration, plant seizure, or mediation, either singly or in combination. Perhaps the first was the least controversial of these three. Trade association registration was usually included to avoid the accusation of bias.

a) Registration

This proposal was brought to a head by the report of the House Naval Affairs Investigating Committee which stated that the labor unions answering its questionnaire had total net assets of $82,594,955 on March 1, 1941, an increase of $10,679,294 since October 1, 1939, the beginning of the defense program.[18] Accordingly, the Committee's recommendation:

[15] SEN. Doc. No. 52. The House Committee on the Judiciary has also compiled a useful reference document for this field of legislation in the form of lengthy, exploratory hearings on Delays in National Defense Preparations which are published in two parts (Part I: Feb. 17, 18, 19, 20, 24, 25, and 28 and March 3, 6, 11, 13, 14, 18, and 24, 1941; Part II: May 7, 8, 12, and 19) 77th Cong., 1st Sess. (1941).

[16] LaFollette's bill (S. 1970) would prevent the use of labor spies, strike-breakers, oppressive armed guards, and industrial munitions. In the House, H. R. 4874, by O'Brien (Dem., Mich.), would provide for the construction needed to strengthen national defense and thereby promote the economic security of the United States by complete and efficient employment of labor.

[17] H. R. 6928, 77th Cong., 2d Sess. (1942).

[18] The AFL has attempted to minimize the significance of these figures by the fact that most of its treasury is held in trust for various benefits to its members. *Hearings before House Judiciary Committee on Delays in National Defense Preparations,* 77th Cong., 1st Sess. (1941) 396.

The tremendous financial gains made by labor organizations during the period of the defense effort and the vast amount of funds and assets in their treasuries present an astounding picture of concentration of wealth, a situation heretofore only associated with industry and finance. These vast tax-exempt funds reposing in the treasuries of labor organizations, many of which by strikes and work stoppages have delayed and in instances even obstructed the defense program, present a problem which the committee feels should well be considered by the Congress. The committee recommends that suitable legislation be enacted requiring all labor unions (along with other special interest groups) to register with a suitable governmental body and to furnish pertinent information concerning their officers, members, and financial condition at periodic intervals.

By requiring information as to the use and disposition of these large sums of money, these bills were also intended, in part, as a legislative answer to the newspaper columnist campaign against labor racketeering. The first successful appearance of such a measure was in the Smith amendment to the Vinson bill in which form, the registration proposal passed the House without having ever passed through the hearing stage of legislation. However, in January, 1942, when it became apparent that there was no immediate likelihood, if any, of Senate action on a bill embracing such a variety of far-reaching changes as were included in the House bill, Representative Vinson (Dem., Ga.) reintroduced, with a few alterations, the registration provisions alone.[19] At this time, several similar bills were already pending in both houses, and the added weight of Vinson's proposal finally brought forth hearings before a subcommittee of the House Committee on the Judiciary in March, 1942.

As would be expected, both the AFL and the CIO, as well as trade associations and chambers of commerce,[20] testified against the bill, though the latter with the least vigor. Specifically, labor organizations argued that the bill was entirely unnecessary as a guard and ineffective as protection against labor racketeers, first, since any union member already has a right to demand a detailed financial statement from his union which is much easier to obtain "in the union than it would be in the case of municipal, State, or Federal government"[21] and, second, "registration plans can make no claim that they are related to the problem of labor racketeering [because] racketeers . . . flourish primarily by extortion or payment from employers . . . [and] extortion payments make no appearance in the union's financial records."[22] In addi-

[19] H. R. 6444, 77th Cong., 2d Sess. (1942).

[20] The measure which passed the House applied only to labor. See H. R. 4139, §§8, 9.

[21] *Hearings before the House Judiciary Committee on H. R. 6444* (hereinafter cited as *"Hearings"*), 77th Cong., 2d Sess. (1942) 25. This claim is subject to considerable doubt in the light of Mr. Arnold's testimony as to a union response to such a request. *Id.* at 86.

[22] *Id.* at 16. Section 3(a) of H. R. 6444 provides: ". . . each labor organization and trade association shall file with the Secretary of Commerce a registration statement setting forth . . .

(1) The names, addresses, compensation, and terms of office of the . . . principal officers of the registrant, and . . . members of its governing body; . . .

(3) Financial information, showing in detail the assets and liabilities of the registrant as of the close of its preceding fiscal year, its receipts and expenditures during such fiscal year, and such other information as the Secretary of Commerce may, by the regulations issued pursuant to this Act, require; . . .

(5) In the case of a labor organization, the names and addresses of any employers with which such organization has any agreement or agreements, and the terms thereof, relating to wages, rates of pay, hours of work, or other conditions of employment of employees represented by such organization;

tion, it was urged that such practice is "obviously in violation of many State and Federal statutes."

It was also urged that Section 3(a)5 of the bill, requiring a list of all employers with whom the union has an agreement and the provisions thereof, would serve no useful purpose after it was furnished and "would impose an extraordinary additional office force necessitating without doubt an increase in the levying of dues [creating] disturbing thoughts among the loyal members as to the need for any increase in dues."[23]

The penalty provisions of the bill were opposed as heavy, ambiguous, and subject to too much discretion in the hands of the Secretary of Commerce, who, it was claimed, might, by technical requirements, find enough violations "to empty a union treasury and put all the officers of the organization in jail."[24]

The most urgently pressed and oft-repeated argument against the bill was a broadside at its motives and net practical results. Thus:

> The sponsors of measures of this type must know full well that in the normal functioning of a democracy, the relationship between an employer and a labor organization is one of collective bargaining, bargaining implying precisely what it means in its similar use in other fields. In the bargaining process it would obviously be greatly to the employers advantage if he knew to the dollar the extent of the union's financial strength, its ability to support a strike if a strike becomes necessary, its ability in general to hold out for better working conditions, or to yield to those dictated by the employer.[25]

The counterargument by Vinson was that employers are required to disclose their financial strength by the Securities Exchange Act and in tax returns so that a corresponding mandate to the unions is only equitable and is owed to union members and the public at large.[26]

Assistant Attorney General Thurman Arnold, called as a witness, indorsed the bill as far as it went, and introduced a significant additional consideration. Having stressed the unbridled power of labor, he concluded:

> In other words, when you come to look at the entire picture, we see a situation which is putting a very substantial handicap upon the distribution of all civilian necessities,

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(6) A statement of the purpose for the registrant was organized and a description of its present activities; and

(7) Such other information as the Secretary of Commerce may consider necessary to effectuate the purposes of this Act.

The registrant shall, at the same time, file with the Secretary of Commerce a verified copy of its constitution, by-laws, and other governing instruments."

S. 2042, a bill of similar import would require, in addition: "initiation fees; annual dues charged each member; assessments levied during the past twelve-month period; limitations on membership; number of paid-up members; date of last election of officers, method of election; the vote for and against each candidate for office; and the date of the last detailed financial statement furnished all members and the method of publication or circulation of such statements."

[23] *Hearings*, 31.

[24] *Id.* at 63. The bill provides a fine of $5,000 and 1 year's imprisonment for labor union or trade association officials responsible for, or having knowledge of, a failure to file a registration statement or report or the making of a material misstatement of fact therein. The Smith-Vinson bill merely disqualified a union which failed to register from representing employees in collective bargaining.

[25] *Hearings*, 17.

[26] See *id.* at 4, 5, 94-95, 98.

depending, of course, on how strongly the union is organized in a particular place, which is destroying the property and the businesses of independent businessmen, and which is impeding the distribution of housing, and particularly the distribution of food, and is doing it at a time when we are trying to save these independent organizations, and I think it is a very serious problem. Certainly the registration of unions would have some effect on it. Whether that would go far enough I simply leave to the judgment of the committee. I think I would be entitled to say that my belief is that it does not go far enough.

I will introduce in the record the recommendations which I made before the Temporary National Economic Committee.

These recommendations provide, in brief, that labor shall be permitted to use its organized power in any way, subject, of course, to local police regulations, provided that the objective was a legitimate objective for the union to use its power for. I describe legitimate objectives as anything which had some direct connection or some reasonable connection with wages, hours, safety, health, and conditions of employment; and that activities which had no connection with these objectives were illegal. Such legislation would eliminate the things I am talking about, because I consider them not the legitimate objectives which a labor union should pursue either on behalf of the public or for the good of the labor union.[27]

At the last session of the hearings, Mr. Vinson presented a summary rebuttal which purported to answer all of the objections,[28] both specific and general, which the hearings had produced. First he emphasized the improvements in this bill over similar provisions in the Smith-Vinson, H. R. 4139, bill which passed the House and which was temporary, emergency legislation, whereas the proposal under consideration would be a permanent addition to the federal labor laws. H. R. 4139 provides for registration under the National Labor Relations Board which "has a very specific duty, which provides for the protection of the rights of collective bargaining by groups of employees, and the safeguarding of the rights of free and untrammelled self-representation. The danger of confusion is immediately apparent." The present proposal substitutes the Secretary of Commerce to receive registration statements.

This "improvement," it should be mentioned, was very strongly opposed by labor on the ground that the Department of Commerce not only has no familiarity with labor problems but also is a "businessman's department." The provision which requires production of "such other information as the Secretary of Commerce may at any time consider necessary to effectuate the purposes of the Act" (§3(d)(3)) was also opposed as unpredictable in its potentialities of harm to labor organizations.[29]

Vinson disposed of the general objection against government control as, *inter alia*, the same that was raised by business to the Securities Exchange Act and pointed to the beneficial effect of the SEC's work as conclusive answer. He argued that financially weak labor unions need not be exposed to economic battle with stronger employers on the ground that "if such facts were made to appear in a petition to the Secretary of Commerce, it is certain that he would consider the case one in which it would not be to the public interest to disclose the financial data, provided, of

[27] *Id.* at 77. [28] *Id.* at 92-102.

[29] *Id.* at 63-65. The purposes of the Act include, ". . . to safeguard and protect the right of individual employees, employers, and the public against abuse of these rights of self-organization. . . ." §1.

course, there were no other circumstances which should be submitted to the purifying light of public examination."[30] To the argument of lack of necessity for publication of financial statements, Vinson replied that in such cases the requirement should be no burden to the unions, but he stressed the fact that Mr. Scharrenburg (of the AFL) "receded from his position and avoided a direct request for a statement showing what each national union does in the matter of furnishing its members with a financial report."

Against the additional argument that the bill would be an "entering wedge by which enemies of labor would eventually crush all unions," Vinson pointed to the New Deal labor record. He concluded by citing as precedent the English voluntary registration system covering 75% of the union membership of Great Britain and by reiterating the bill's preventive rather than corrective objective.[31]

b) Plant Seizure Proposals

This form of legislation, urged particularly by Senator Connally, would give explicit statutory authority to the President to seize defense plants when he "finds, after investigation, that the national defense program will be impeded or delayed by an existing or threatened failure of production at such plant as a result of a strike or other labor disturbance or other cause, and that the exercise of such power and authority is necessary or desirable in the public interest."

This was first proposed in June, 1941, as an amendment[32] to the Selective Training and Service Act of 1940. Without any specific labor provisions, it was reportedly approved by Administration leaders as a symbol of the popular approval of the Army's taking over struck defense plants.[33] As has been remarked,[34] a substantially similar measure passed the Senate two days after the Army Air Corps took over the North American Aviation plant. There were no hearings or committee reports on either of Mr. Connally's proposals. The bill simply came up on the floor of the Senate as an amendment.[35] Before passing the Senate, Connally's proposal was amended three times. The Byrd amendment specified that "strikes or lockouts that impede or delay the national defense effort are contrary to sound public policy, and . . . are . . . condemned," and that "strikes or lockouts in such industries in which either side refuses to recognize arbitration or mediation . . . are . . . condemned." The LaFollette amendment added:

[30] The bill provides that ". . . the Secretary of Commerce may treat as confidential, or restrict the inspection of, any information contained therein which he shall not deem in the public interest to disclose." §7.

[31] There is, as yet, no committee report on this measure. The most recent action of any significance in this field was in April, 1942, when Senator O'Mahoney (Dem., Wyo.) introduced a new Federal Charter Compliance Act (see 88 Cong. Rec., April 6, 1942, at 3461, for text of S. 2438) which, in addition to its corporate provisions, provides (§6) that the Commission shall issue a certificate of statutory compliance to any labor union if its charter provides for annual election of officers, free nominations, supervision of elections by members, independent public audits at least biennially, and a $10 maximum initiation fee.

[32] S. 1600, by Connally.

[33] See N. Y. Times, June 11, 1941, p. 14, col. 3.

[34] P. 504, *supra.*

[35] Some Senators pointed out that such a procedure would probably cause mistakes which would be regretted in time to come, 87 Cong. Rec., June 15, 1941, at 5185.

> The Congress hereby further declares that complete cooperation between government, management, and labor can best be achieved by the whole hearted acceptance of the principles of collective bargaining and the recognition of the rights of employees to designate representatives of their own choosing, for the purpose of collective bargaining, without interference through unfair or oppressive labor practices.

The Ball amendment was opposed by Senator Connally on the ground that he did not want his amendment "diluted, denuded, dehorned, and de-everything in order to get it through[35a]"; however, it was passed by a majority of two votes. It required that before seizing a plant, the President must make the additional finding:

> That either or both parties to such [labor] dispute have failed to utilize existing government conciliation and mediation facilities in an effort to settle such dispute, or that despite the use of such facilities, the dispute has not been settled and a failure of production exists or is threatened.

These provisions were referred to the House where they were ignored, partly due to the fact that the House was considering a more stringent measure along similar lines in the form of the May amendment to the Selective Training and Service Act. This measure broadened the basis for government intervention in defense plants.[36] It was opposed by the Administration and defeated on the floor of the House. In the House-Senate conference a combination of the Connally and May proposals relating to plant-seizure was inserted again. Thereupon the House voted to return the bill to conference with instructions to oppose the plant-seizure provisions. In August, 1941, the conference agreed to delete the labor provisions after which the bill passed both chambers.

However, in November, 1941, Senator Connally reintroduced a similar measure with new provisions to freeze the *status quo* in labor relations during government operation of any plant and to provide for a "Defense Wage Board" to handle wage adjustments during government operation.[37] Hearings were held on this bill (not published at this writing) and a favorable report was filed in December, 1941. In contrast to Vinson's registration bill, this report stresses the emergency and temporary character of this Act.[38]

The President is required, before acting, to find, upon investigation, "that there is an interruption of the operation of such plant as a result of a strike or other labor disturbance or other cause, that the national defense program will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority

[35a] *Ibid.*

[36] In addition to authorizing government intervention in case management refused to conciliate or mediate, the bill would make it unlawful to attempt to prevent by force or threats thereof, any person from accepting or continuing employment in any defense plant. Furthermore, in the event of a work stoppage through "subversive influences or otherwise, not constituting a refusal," then the President would be empowered to order the plant to resume production immediately. He could enforce this order through the Secretaries of War and Navy, and "afford protection to all persons engaged in the operation of such plant or industry who voluntarily desire to work in such plant." This power was to continue during the emergency but it was not to be construed as giving any defense worker the status of a government employee. See N. Y. Times, June 25, 1941, p. 10, col. 4.

[37] S. 2054.

[38] See SEN. REP. No. 486, 77th Cong., 1st Sess. (1941).

is necessary to insure the operation of such plant in the interest of national defense. . . ." (§1). (It will be noted that the restrictive amendments added to the first Connally bill on the Senate floor were omitted.)

Provision is made for returning plants to their owners "whenever the President determines that the plant will be privately operated in a manner consistent with the needs of national defense." (§1). Section 2 aims at avoidance of the closed shop problem during government operation[39] by freezing all labor relations although it does not prevent the Government from improving working conditions. Finally, the report fairly characterizes the bill's last section as follows:

> Section 3 establishes a Defense Wage Board which is to be composed of three members who shall be appointed by the President by and with the advice and consent of the Senate. Upon petition filed with it by a majority of the employees of any such plant or their representative the Board is directed to make an investigation of the wages paid at such plant, the cost of living in the community . . . the wages established for work of like or comparable character in the industry, and such other factors as the Board may deem necessary or desirable in the public interest. If the Board finds that the wages paid at such plant are not fair and reasonable it is directed, with the approval of the President, to order such readjustments of wages as it deems will fairly and reasonably compensate such employees for their work. . . . Subsection (e) . . . terminates the authority of the Board upon the expiration of the unlimited national emergency. . . .

The real significance of this measure lay not so much in its own proposals which have raised relatively little controversy. Its great importance was due to the strategic preferential position which it obtained in the Senate. Senator Connally was able to obtain a motion to take up his bill on the floor and was in a strong position to secure its passage. At the same time, to bring such a measure out for consideration would have made it in order to introduce a wide variety of amendments from the floor since its own proposals, though mild in themselves, touched on enough different aspects of labor control to make the most stringent and repressive amendments germane to the measure under discussion. The insistent objection which Senator Byrd (Dem., Va.) made on the floor of the Senate when Connally withdrew his motion in April, 1942, makes this procedural significance of the Connally amendment abundantly clear.[40] Apparently it was conceded that this afforded the last good chance to get Senate consideration of any repressive labor legislation after the Administration had definitely taken an opposing stand in President Roosevelt's anti-inflation message to Congress in April.

c) Proposed Limitations on the Right to Strike

The proposals most numerous and subject to the bitterest controversy are those which would, by one method or another, limit, supervise, or postpone the right to strike or lockout. The related bills range in degree of severity from the rather mild

[39] After seizure, the plant "(a) shall be operated under the same terms and conditions of employment which were in effect at the time possession of such plant was so taken, or (b) in the event operation of such plant is interrupted or stopped at such time, shall be operated under the same terms and conditions of employment which were in effect at such plant immediately preceding such interruption or stoppage."

[40] See 88 Cong. Rec., April 12, 1942, at 3862 *et seq.*

bill (S. 683), introduced by Senator Ball (Rep., Minn.) and reported favorably by the Senate Committee on Education and Labor, to the most far-reaching Smith-Vinson bill (H. R. 4139), passed by the House and consolidating most of the various proposals which had been made in separate bills over a considerable period of time.

Although no action has ever been taken on the Ball bill by the Senate as a whole, it is the only strike legislation which was reported out of committee in the Senate.[41] There is little danger of inaccuracy in saying that this bill, as reported, represents the most thoroughly considered piece of proposed legislation within the scope of this survey. Senator Ball's first effort was S. 4434, introduced in November, 1940. With several modifications he reintroduced the measure as S. 683 on January 31, 1941. Thereafter he added three amendments. After reports from several government departments had been received, committee hearings were held from May 6 to 29, 1941, compiling over three hundred pages of testimony and resulting in a complete rewriting of the bill to meet many of the objections raised by labor in the hearings.

As finally formulated, S. 683 aims to state a clear national policy and a set of procedures for settling of labor disputes. With the exception of Section 9, it is not temporary legislation nor is it restricted to defense industries. It embraces all but the railway industry which has its own mediation act. The committee takes the position that "almost endless controversy [is] bound to arise over any attempted definition of 'defense industry'."[42]

During the hearings, it was repeatedly pointed out that strikes cannot be successfully be outlawed, even temporarily, (citing the examples of Kansas, New Zealand, Canada, and Britain) and, accordingly, the bill embodies no penalty provisions against strikes. It was argued that the "executive branch of the Government under the Selective Service Act, the Property Seizure Act, as well as under the President's constitutional powers as Commander in Chief of the Army and Navy now has adequate authority to obtain resumption of production in a critical defense plant once production has halted. . . ."[43] It was also felt that this type of legislation was more likely to enlist the support of labor, while serving as notice of a last chance for voluntary cooperation.

Roughly, the bill sets up the following procedure: Whenever a change in wages, hours, or working conditions is sought by either labor or management, the moving party is to give 30 days notice in writing. Within five days, a meeting is to be arranged between them for direct negotiations.[44] If this fails, the dispute goes to the Conciliation Service of the Department of Labor, which however, may intervene on its own motion at any time. If still no settlement is reached, the next step is reference to the National Defense Mediation Board (the then existing Board or its successor). No publication is to be made at this point, but, if the added prestige of the Board is unavailing, the points still in controversy are referred to a Labor Disputes Commis-

[41] SEN. REP. No. 847, 77th Cong., 1st Sess. (1941).

[42] *Id.* at 3. [43] *Id.* at 2.

[44] This step was inserted to meet the objection that the bill prevented true collective bargaining by imposing government regulation.

sion[45] which investigates[46] and publishes findings of fact and recommendations as to settlement of the points in dispute. The rest is left to the force of public opinion.

The objection was stressed during the hearings that forbidding strikes to be called while the above negotiations were in progress would, in effect, destroy collective bargaining since management would always take the opportunity of putting off the payment of wage increases. Since many contracts are of short duration, the delay would give management a great advantage. To meet this argument, Section 4(f) of the final draft provides that, where arbitration is agreed upon, the employer must agree in writing to make the wage provisions of the final settlement retroactive at least to the date of original agreement, or in "any case in which both parties . . . accept the recommendations for settlement made by the Commission . . . the employer shall make the wage provisions of such settlement retroactive at least to the date when the points in controversy were referred to the Commission." Of course this still leaves what might be a considerable period of time unprovided for, since only "reasonable" speed is required at each step in the process between the original 30-day notice and the final transmission of a dispute by the Mediation Board to the Commission. During all this time, in the absence of agreement to arbitrate, no retroactive provision would apply.

Section 6(a), preserving the *status quo,* is opposed by labor on the ground that it puts all negotiations on the basis of strike disputes rather than voluntary cooperation. The closed shop problem is approached rather uniquely through Section 9, the only temporary part of the bill, which provides:

(a) . . . it shall be unlawful for any employer engaged in a business affecting interstate or foreign commerce or the national defense to enter into any contract or agreement with his employees, or any group thereof containing a provision that membership in a labor organization shall be a condition of employment by such employer, if such organization or any of the employees to whom such provision is applicable has, after the date of enactment of this Act and within one year prior to such employer's entry into such contract or agreement, engaged in a strike or stoppage of work to secure such condition of employment, unless such contract or agreement is a renewal or extension of a contract or agreement containing a similar provision.

Paragraph (b) declares contracts violating the section void and unenforceable, and subjects employers entering into such a contract to a fine of not less than $1,000 nor more than $10,000. The committee report remarks as follows:

This provision does not outlaw strikes for closed shops. It makes such strikes completely futile. It does not freeze the closed shop because employers could still agree without a strike to a closed shop. Neither could an employer use the provision in an attempt to deny renewal of an existing closed shop agreement because his employees could then strike to force him to renew.

[45] Composed of three members appointed by the President with advice and consent of the Senate, for terms of six years, and salary of $10,000 per year. It would have power to investigate labor disputes and make recommendations for settlement, arbitrate disputes submitted to it, and adjudicate disputes as to proper construction of provisions in existing collective bargaining agreements.

[46] Subpena power is given to the Commission by Section 7.

Organized labor opposes this provision and most of the rest of the bill, whereas the representatives of management who appeared before the committee, including the National Association of Manufacturers, feel that it does not go far enough and would broaden it considerably. Such government officials as testified favored at least the bill's objectives.[47]

THE SMITH-VINSON BILL

During the height of the public indignation which the captive coal dispute aroused throughout the nation, the Vinson bill, H. R. 4139, reached the floor of the House of Representatives, received the addition of the Smith amendment, and was passed. The history of this measure is revealing. It was first introduced on January 29, 1941, as H. R. 2850. On March 21, it reappeared as H. R. 4139. Opponents of the measure have alleged that the original bill was deliberately framed in terms of "naval-defense contractors" to keep it under the watchful care of its sponsor (chairman of the House Naval Affairs Committee) and out of the hands of the Committee on Labor. Certainly the Committee on Labor has put to sleep a considerable number of similar proposals[48] but, be that as it may, the Naval Affairs Committee, under Mr. Vinson, began hearings April 15, 1941, with testimony from Secretary of the Navy Knox and John Green, President of the Industrial Union of the Marine and Shipbuilding Workers of America (CIO affiliate). The committee next met on April 17, but no other outside witnesses were called to testify, and it proceeded to consider drafting amendments and terminology.

The testimony of Mr. Knox was equivocal. He favored a cooling-off period but opposed any coercion. Mr. Green opposed the bill on general principles—first, as unnecessary in view of the production accomplishments already realized without additional legislation; second, as an abridgement of labor's rights on the ground that "compulsory arbitration is no better than rule by edict . . . even if it is only exercised for a limited time."[49]

There were some minor changes in committee in addition to the substitution of "national-defense contractor"[50] for the original "naval defense contractor."

[47] Mr. Leiserson of the National Labor Relations Board felt that the bill would not effectuate its stated policy but many of his specific objections were corrected in the final draft. Mr. Bruere of the Maritime Labor Board endorsed the policy of mediation but desired to preserve the Maritime Labor Board. Governor Stassen of Minnesota favored the bill as a copy of Minnesota's statute which he considered successful.

[48] A memorandum from that committee lists the following restrictive labor bills on which no action was taken: in the 1st Session of the 77th Congress (1941): H. R. 4406, 4637, 4874, 5035, 5015, 6068, 6074, 6075, 6039, and H. J. Res. 247; in the 2d Session (1942): H. R. 6689, 6777, 6796, 8045, and 9507.

[49] *Hearings before the House Naval Affairs Committee on H. R. 4139*, 77th Cong., 1st Sess. (1941) 849.

[50] Section 302, "The term 'national defense contractor' means—

(1) an employer engaged in:

(A) the production of arms, armament, ammunition, implements of war, munitions, clothing, food, fuel, or any parts or ingredients of any articles or supplies; or

(B) the construction, reconstruction, repair, or installation of a building, vessel, plant, structure, or facility;

under a contract entered into . . . by the Secretary of War, the Secretary of the Navy, the United States Maritime Commission, or by an officer or employee of [any of them] or under contract entered into . . . by the Secretary of Treasury or by [a Treasury] officer or employee . . . which the Secretary of the

In rough outline, the bill requires national defense contractors and their employees to adopt the following procedure to settle their disputes: they must first try to agree by conference or utilization of applicable procedure specified in their collective bargaining agreements. Failing this, either party may request assistance of the Conciliation Service of the Department of Labor. Interested parties are then notified by the Secretary of Labor and are required to submit their claims in writing and attempt a settlement. If, after not less than five days, any party considers settlement impossible, he may give notice of an intention to strike or lock out. Such notice automatically transfers the dispute to the National Defense Mediation Board where every effort must be made to reach a settlement. Within twenty days after such notice, the Board must render a report to the public if settlement is reached. Until the requisite notice has been given and the Board's report published, strikes or lockouts are unlawful. Thus the minimum cooling period is 25 days. To maintain the *status quo* during this period, it is further made unlawful for an employer, without written consent of his employees, to continue in effect any change in working conditions which results in a labor dispute.

In reference to closed shops, the bill forbids a defense contractor to enter into a closed-shop, preferential-shop, or any similar agreement with any labor organization, unless such an agreement was in existence on the date of enactment of the bill (§307).

It is sought to eliminate subversive activities by the much criticized vehicle of forbidding (§308(a)) any national defense contractor to employ or retain anyone "whom such contractor has reasonable cause to believe—

(1) teaches, advocates, or believes in, or has at any time advocated or believed in the duty, necessity, or propriety of controlling, conducting, seizing, or overthrowing the Government of the United States by force, violence, military measures, or threats thereof; or

(2) is, or at any time was, a member of, or is soliciting or advocating or has at any time solicited or advocated membership in, the Communist Party, the Young Communist League, the German-American Bund, or any organization which teaches, advocates, or believes in, or at any time has taught, advocated, or believed in, the duty, necessity, or propriety of [the acts listed in par. (1)]; or

(3) is disseminating or distributing, or at any time has disseminated or distributed, any book, pamphlet, leaflet, or other item of written, printed, or graphic matter (A) teaching or advocating the duty, necessity, or propriety of [the acts listed in par. (1)]; or (B) soliciting or advocating membership in the Communist Party, the Young Communist League, the German-American Bund, or any organization [of the sort described in par. (2)].

In addition, all present and prospective employees of defense contractors are required to make affidavit that they are not individuals of the proscribed character.

Treasury at any time by order declares is a contract necessary to the national defense, or under a contract with another national defense contractor which [any such Secretary or the Commission], at any time by order declares is a contract necessary to the national defense; or

(2) an employer engaged in the production or handling of any article described in Proclamation Numbered 2237 promulgated by the President on May 1, 1937; but such term shall not include an employer engaged in the production of farm products on a farm."

Lastly, if the Board decides that an employer has reason to believe that a worker who has been discharged or refused employment is of that character, the NLRB cannot order his reinstatement but he may within 30 days apply to the Mediation Board for reinstatement on showing good character.

The penalty provisions call for fines of not more than $5000 or imprisonment for not more than a year or both and the termination date is set at three years from date of enactment or termination of the national emergency, whichever occurs first.

A strong minority report was filed against the bill by Representative Magnuson with the concurrence of five of the 30 members of the committee. Therein it is charged that "this legislation was rushed through the committee without adequate notice to the major labor unions. . . . Forty-nine hours after the telegram announcing the opening of hearings was sent to Mr. Murray . . . hearings on the bill had been closed. Seventy-eight hours after the telegram was sent, the bill was reported out of committee. . . . It is also true that no employer was heard . . . nothing was announced in the press or in any other fashion regarding hearings. . . . It is almost unthinkable that the most important piece of legislation to come before Congress in many years would conclude hearings with but two witnesses."[51]

The minority report objected specifically to the declaration of policy that employees "in the exercise of their rights guaranteed under the National Labor Relations Act should not use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain therewith." It is alleged that, in practice, this will mean the amendment to the NLRA which Representative Hoffman urged but which was specifically rejected by the Committee on Labor and the House. The minority fears that "coercive measures" without any statutory amplification might be construed by adverse courts in accordance with the earlier common law torts doctrine so as to include even peaceful picketing, and thus bring about the destruction of the fundamental purposes of the NLRA. The report adds:

> Equally astounding is the last phrase in this paragraph, "nor to induce employers to bargain or deal therewith." Strikes, picketing, peaceful persuasion, or even threats of strikes, could be construed under this section, to be coercive measures, and are all outlawed.[52]

It is claimed that Section 301(e) and (f) not only freeze the closed shop situation, but also "wages, hours, and other conditions of employment. . . . Insofar as new business is concerned, no closed shop could be maintained . . . even if all parties agreed."[53] The report concludes that freezing the open and closed shop is an

[51] H. R. REP. No. 427, pt. 2, 77th Cong., 1st Sess. (1941) 2 *et seq.*

[52] *Id.* at 5.

[53] Such an interpretation as to wages, hours and working conditions requires a rather strained construction of the statutory language which is:

(e) In the establishments of national defense contractors where the union shop exists, such condition should continue, and the union standards as to wages, hours of labor, and other conditions of employment should be maintained; and

(f) In establishments . . . where union and nonunion employees now work together, the continuance of such condition should not be deemed a grievance, but this declaration is not intended in any manner to deny the right, or to discourage the practice of the formation of labor organizations, or the

unjustified subterfuge to freeze one and destroy the other. The compulsory mediation and cooling period is attacked as contrary to national policy, impractical, unnecessary, and as placing a weapon in the hands of the employer by which he may complicate unreal disputes and drain away the union's financial strength. The sections of the bill aimed at subversive elements are violently attacked on the ground that their nebulous wording would allow employers almost unrestricted power to abuse fundamental civil rights and to ignore the NLRA by discharging active union members and claiming "reasonable cause to believe" that they had "at any time" in the past "believed in the overthrow of the government" or advocated membership in the forbidden organizations.[54]

These reports were filed in April, 1941. In November, shortly before the bill came before the Committee of the Whole House, Vinson filed a supplementary report[55] which discussed a completely amended proposal. The "subversive" provisions were eliminated entirely, the policy statement under attack was deleted, the penalty provision was abandoned in favor of enforcement by federal injunction at the instance of the Attorney General. It is a fair generalization, if not an understatement, to say that the entire proposal was toned down and softened appreciably.

Acutely aware of the Senate report on the Ball bill, the Naval Affairs Committee reports on the Vinson bill, and constantly mindful of the increasing pressure caused by the captive coal dispute, the House Committee on Labor finally produced a favorable report[56] on a mediation measure by Representative Ramspeck (Dem., Ga.). Mild by comparison with its fellow travellers, it provided that the Mediation Board should take jurisdiction of any labor dispute not within the purview of the Railway Labor Act, which it finds "substantially affect the National defense and cannot be expeditiously adjusted by collective bargaining or other conciliation and mediation procedures." (§4). The Board is then to attempt a settlement or to induce voluntary arbitration. If unsuccessful, findings and recommendations are to be published. After the Board takes jurisdiction, the *status quo* is to be preserved by cease-and-desist orders from the Board, enforceable by the Attorney General in federal district courts.

The Ramspeck bill also contained a plant-seizure provision similar to the first Connally amendment.[57]

The original Vinson bill came before the House on December 3, 1941. The Ramspeck bill was immediately offered as an amendment. At that point, however, Representative Smith of Virginia offered a substitute for the Ramspeck proposal. By

joining of labor organizations, by the employees of such establishments, nor to prevent the National Defense Mediation Board from urging, or any umpire from granting, under the machinery provided in this title, *improvement of their situation* in the matter of wages, hours of labor, or other conditions, as shall be found desirable from time to time. (Italics supplied.)

[54] See p. 506, *supra*.

[55] H. R. REP. No. 427, pt. 3, 77th Cong. 1st Sess. (1941).

[56] H. R. REP. No. 1458, 77th Cong., 1st Sess. (1941), published on November 28, reporting on H. R. 6137.

[57] See p. 511, *supra*.

parliamentary procedure, it was therefore in order to consider the Smith proposal before coming to the Ramspeck bill at all. The net result was that the Smith substitute finally passed the House and the Ramspeck bill was never directly considered.

In many respects, Smith's bill went much farther than the original Vinson bill. In addition to the mediation procedure already outlined, it attacks the problem of subversive elements from the position of limitation on union membership and office (discussed in the first section of this survey). Thus:

> Sec. 1A. Any labor organization which knowingly or negligently permits any member of the Communist Party of the United States, or the Young Communist League, or member of the German-American Bund, or the Kyffhäuserbund, or any person who has been convicted of a felony involving moral turpitude to hold office, appointive or elective, in such labor organization shall cease to have and cease to be entitled to the status of a labor organization under the National Labor Relations Act so long as such person continues to hold office.

An entirely new provision was added providing for a secret ballot, supervised by the United States Conciliation Service, as a prerequisite before a union can give a strike notice (§3). Another new provision entitled "Violence and Intimidation" restricts picketing at plants[58] and forbids it at any person's residence.[59]

During the debate, Representative Hobbs introduced an amendment prohibiting importation of picketers or strikebreakers, which was successful.[60] To fill out the picture, Section 6 attempts to outlaw boycotts, sympathy strikes, and jurisdictional disputes.[61]

[58] Sec. 5 (a) It shall be unlawful for any person, by the use of force or violence or threats thereof, to prevent or to attempt to prevent any individual from accepting employment by, or continuing in the employment of, any defense contractor, or from entering or leaving any place of employment of such contractor in the course of such employment.

[59] (b) Notwithstanding any other provision of the Act, it shall be unlawful for one or more persons, for the purpose of inducing any person to work or abstain from working for a defense contractor, to watch or beset a house or place where a person resides or the approach to such house or place.

[60] (c) It shall be unlawful, notwithstanding any other provision of law, for one or more persons acting in contemplation of furtherance of a labor dispute to attend at or near a place where a defense contractor carries on business, for the purpose of obtaining or communicating information, or of persuading or inducing any person to work or abstain from working, unless such persons so attending, were, immediately prior to the beginning of such labor dispute, bona fide employees of such contractor, or for a defense contractor to employ any person who is to be employed for the purpose of obstructing or interfering by force or threats (1) with peaceful picketing of employees during any labor dispute affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining.

The prohibition against strikebreakers was added on the floor at the suggestion of Rep. Hook (Dem., Mich.).

[61] Sec. 6 (a) It shall be unlawful, by means of a strike against a person (whether or not a defense contractor), or by means of a concerted refusal to work on, handle, or otherwise deal with articles or materials produced or manufactured by any such person, to induce or require or attempt to induce or require another person who is a defense contractor to recognize, deal with, comply with the demands of, or employ members of, any labor organization.

(b) It shall be unlawful, by means of a strike against a defense contractor, or by means of a concerted refusal to work on, handle, or otherwise deal with articles or materials purchased, produced, manufactured, or used by a defense contractor, to induce or require or attempt to induce or require such contractor to recognize, deal with, comply with the demands of, or employ members of, one labor organization instead of another labor organization with which such contractor has an applicable collective-bargaining agreement.

Another major innovation in the Smith substitute is its multi-method enforcement provision. For any violation, an injunction may be had, notwithstanding the Norris-La Guardia Act (§7(a)), or a civil damage suit may be maintained (§7(b)). In addition, any employee who violates the Act loses his status under the NLRA, his right to any federal relief, and his right to unemployment compensation under the Social Security Act (§7(c)), and any organization violating the Act or retaining as its officer or representative any violator of the Act loses its status under the NLRA and the Norris-La Guardia Act (§7(d) and (e)).

Finally, the Smith substitute throws in a registration provision very similar to the one discussed above in connection with H. R. 6444.

The scope and extent of these additions no doubt speak for themselves. It should be emphasized that they passed the House at a period when public opinion was at the peak of distress reached during John L. Lewis' defiant stand in the captive coal dispute. During the debate it was reiterated by supporters that the Nation was insisting on action. Opponents stressed the headlong haste and lack of thought with which the proposals were being pushed to a vote, and especially emphasized the fact that no hearings of any sort were held on any of Smith's proposals.[62] The separate vote on the Smith substitute amendment was 229 for, 158 against. Ramspeck moved to recommit the bill to the Committee on Naval Affairs with instruction to substitute his measure, but Representative Rankin (Dem., Miss.) was sustained in the point that the motion to recommit was out of order since "a motion to recommit cannot contain instructions to amend an amendment which has just been adopted by the House." Floor consideration of the Labor Committee's proposal was thus procedurally impossible, and the vote on the bill, as amended, was 252 to 136. It is impossible to read the history of this bill without being impressed by the astuteness with which parliamentary rules were enlisted as an ally by its supporters.

The Senate Committee on Education and Labor to which the bill was referred has taken no action on it, and since that committee has informally taken the position that further legislation is inadvisable until the War Labor Board has shown its mettle, it does not seem likely that the immediate future will bring new developments.

As late as May, 1942, however, a subcommittee of the House Committee on the Judiciary was concluding hearing on H. R. 5218, a bill by Mr. Walter "to confer jurisdiction on United States courts in cases involving work stoppages for non-labor purposes" but these hearings have not been published (at this writing) and no committee report has been forthcoming.

[62] 87 Cong. Rec., December 3, 1941, at 9613-9636, contains the general debate.

WARTIME METHODS OF DEALING WITH LABOR IN GREAT BRITAIN AND THE DOMINIONS

MARGARET H. SCHOENFELD* AND ANICE L. WHITNEY†

The British preference for voluntary action rather than compulsion in promoting industrial production has persisted throughout the present war. Although the Government has statutory powers to take any measures required in the interest of the war effort, controls have been introduced slowly and only when it became clear that the war effort was likely to be hampered if the voluntary machinery of employers and employees were not supplemented. Labor has been ready for the successive controls before they became effective and has sometimes urged their adoption. Worker representatives have participated in formulating the emergency laws and regulations. When necessary, collective agreements have been modified by joint action of employees to permit changes in wages and hours and other working conditions. In surrendering the gains acquired over many years the workers of Great Britain are making their contribution to hastening victory. In return they demand a better postwar world and the Government has already pledged restoration of trade practices that are temporarily waived.

Measures established in Great Britain have greatly influenced those of the Dominions—as, for example, in Australia, Canada, and New Zealand. However, timing of labor controls has varied considerably as have the rigor and scope of application. The degree of industrialization before the war, the organization of industry, and the political party in office partially account for developments. Nearness of the several countries to the theater of war has also been a factor in determining the speed of economic mobilization and changes in labor standards.

In Australia and New Zealand, countries that were not highly industrialized before the present war and which had an orderly procedure for determining working conditions by the arbitration courts, drastic powers over labor were not exercised until after Japan entered the war. Up to that time the major efforts of these two countries were directed toward supplying men to the Empire's armed forces in remote areas and butter, meats, wool, and other agricultural and pastoral products to Great Britain.

In Canada industrialization was intensified immediately with the outbreak of war

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and members of the armed forces of the allied nations were sent into the country for training. To avert inflation as a result of greatly increased buying power curbs were placed on prices and wages in 1940 and strengthened in 1941. A basis for an all-out war effort through general conscription of manpower was not established until April 27, 1942, when the question of conscription for overseas service was favorably determined by plebiscite.

Great Britain's procedure has been still different. Staffing the war plant was paramount from the start. Up to late 1941, when the building program of war plants was complete, labor shortages were often localized geographically and industrially and could be met by directing employees to transfer and maintaining those of special skills for particular industries. But in December 1941 legislation was enacted providing for conscription of women as well as men for the auxiliary armed forces, civil defense or industry.

Methods adopted in Great Britain for dealing with wartime labor problems are described in some detail in this article, followed by résumés of the Australian, Canadian, and New Zealand machinery.[1]

GREAT BRITAIN

Conditions differ greatly in this war from those of 1914-18, but nevertheless basic labor problems are the same. Therefore, Great Britain has made use of earlier as well as present experience in shaping labor policy. After Munich, plans were made to prevent a haphazard movement of skilled men from essential civilian tasks into the armed forces, which, if unchecked, would have seriously impaired capacity to produce military equipment and supplies. For the past two years apportionment of manpower remaining in civilian pursuits has involved careful planning to secure the maximum production from a relatively small population. Facilities have been established for training workers for jobs requiring higher skills and for bringing as many new workers, chiefly women, into industry as possible. It is imperative that plants once staffed shall be kept in operation and therefore new arbitration machinery was provided for in industrial disputes. Finally, checks have been placed on inflationary movements which follow when earnings rise and the volume of goods declines, and efforts have been made to prevent impairment of the workers' health and welfare under the necessarily abnormal conditions of employment.

Allocation of Manpower

When the voluntary national service campaign started early in 1939, the first schedule of reserved occupations was used in reserving from military service those men required to maintain war production. Men were then restricted in joining the armed forces in other than their regular trade or professional capacity and for service that would entail full-time duty in case of war. The first wartime schedule of

[1] No effort will be made to supply citations to the numerous statutes and orders to which reference, frequently by title, is made in the text. In a bibliographical note at the end of the article, references to the various source materials employed have been collected. As this article was prepared in the spring of 1942 very recent labor developments are not covered.

reserved occupations was issued in September 1939. Since that time the schedule has been amended frequently in the light of experience and the rapidly changing military and industrial needs. Early in the war, occupation and age determined whether a man would be reserved from service in the forces. In 1941 a third factor was added, namely, whether the man performed work essential to the war effort. The schedule was revised again in December 1941 to show the ages of reservation for reserved occupations as of the first of that month. Arrangements were being made to replace gradually the existing method of block reservation by occupations, by a system of individual deferment of calling up. Employees who are dereserved under the new plan and their employers have the opportunity of applying for deferment.

Power to apportion labor between war and other industries has been assumed under a series of laws and regulations of which the first was enacted August 24, 1939. Under the Emergency Powers (Defense) Act of that date, the King was empowered to make defense regulations, by orders in council, for securing the public safety, the defense of the realm, the maintenance of public order, and the efficient prosecution of any war, and for maintaining supplies and services essential to the community. When the act was renewed a year later it was extended to provide for the issuance of orders in council requiring persons to place themselves, their services, and their property at the disposal of the Crown to the extent necessary for the same purposes. Power was also granted to amend legislation passed since the beginning of the war. The Emergency Powers Act was renewed again in the summer of 1941.

The successive enabling laws under which the Minister of Labor and National Service has directed persons to perform required services have had a profound effect on the utilization of labor. The 1940 act was broader in scope than that of 1939, but further power was thought needed to conscript women as well as men, and this led to passage of the National Service (No. 2) Act in mid-December 1941. Women were made liable for service in the armed forces, civil defense, and certain industries. They will not be required to handle lethal weapons, but may volunteer to do so. For the present, single women, between 20 to 30 years, will be called in that order. Married women are not to be conscripted but will continue to be directed into industry. Women having children under 14 years in their care are exempt.

At the same time the age for compulsory military service for men was raised from 40 to 50, the intention being to place the older men in sedentary work to relieve younger men for combat duties. The minimum draft age for boys remains 18, but in the future boys will be called up at 18½ in place of 19. Boys and girls between the ages of 16 and 18 are required to register and will be interviewed to encourage them to join appropriate organizations. The minimum age for entry into the Home Guard was reduced to 16 for certain duties.

Growing labor shortages led to broadening the scope of the Emergency Powers Act when it was renewed on May 22, 1940, making it possible to "direct" workers into war work. The Undertakings (Restriction on Engagement) Order of June 10, 1940, forbade employers to engage a worker or seek to engage one, except by report-

ing to the labor office of the Ministry and engaging the worker it suggested. Restrictions were placed on engineering, building, and civil engineering, agricultural (male) workers, and coal-mining workers.

But it was not enough merely to facilitate the transfer of labor to war industries. Some measure was needed to prevent them from drifting back to the labor exchanges for new assignments. The answer to this need was the Essential Work (General Provisions) Order of March 5, 1941, which as applied prevents loss in production through unnecessary turnover of labor or absenteeism. Employers may not bid against each other for employees, and skyrocketing of wages is avoided. Application of the order to an industry is not automatic. It depends upon scheduling by the Minister of Labor of any enterprise which is engaged in "essential work" as defined in the order. Under an amendment specific classes or descriptions of persons may be scheduled instead of the entire enterprise. In a scheduled establishment employment is guaranteed under terms no less favorable than are fixed for the same kind of work by collective agreement. The management may discharge employees only for serious misconduct, and the employee's right to leave is strictly controlled and is, in general, subject to permission from a national service officer and at least one week's notice. An employee may be lent without permission for not to exceed 14 days. Unexcused absence is penalized.

In return the employee receives a guaranteed time-rate minimum wage. When work in his usual occupation is not available, however, he must be willing to do work he can reasonably be expected to perform. Appeals from assignments are allowable. The wage provisions of orders do not supersede more favorable terms of collective agreements.

Special groups were registered for employment before 1941, but on March 15, the Minister of Labor issued the Registration for Employment Order of 1941 authorizing a survey of the available labor force in the country. Men with experience in specialized branches of employment such as marine engineering, Merchant Navy, and coal mining, have been registered at different times. Young women of specified ages have been ordered withdrawn from certain trades under the 1941 order. Women in the retail distributive trades (other than food) between age 20 and 25 are affected, as are certain other occupational groups. Withdrawals from these retail trades are being pushed to the limit. The volume of trade is constantly shrinking, owing to shortages of materials for civilian use, and the Government took steps last November to license new establishments with the object of eventually reducing the number of retail outlets. On January 1 it became illegal to open a new shop or to sell new lines at existing shops without a Board of Trade license issued by the local price-regulation committees.

New Sources of War Labor

Labor obtained by exercise of the Government's compulsory powers was supplemented under a new scheme whereby a diversified group of civilian-goods industries

were voluntarily concentrated and a part of the labor, machines, and materials were released for war orders. The plan was presented in March 1941, by the Board of Trade. Civilian-goods manufacture that is absolutely necessary was concentrated in a limited number of the more efficient plants in the respective industries. A plan was worked out whereby the establishments that continued to produce—known as nucleus plants—would provide a measure of compensation for those suffering loss of their business. The Government did not undertake to indemnify owners. As originally planned, the concentration was virtually completed in November and 144,000 workers and 45,000,000 square feet of factory space were released for more important use.

Before the conscription act became law in December 1941, when women entered upon war work voluntarily and by direction, and, when they could not be called for the auxiliary military services or civil defense, the need for their services was widely publicized, the appeal being made on patriotic grounds.

Recognizing the difficulties confronting married women while doing war work, day nurseries were created in limited number for the care of children, hours of shops in some areas were adjusted to permit after-work marketing, and marketing was in some cases done by volunteer shoppers acting for several employed women. While helpful, these measures are on a small scale and would need to be greatly extended to fulfill a highly useful purpose. Extension of nursery facilities is often discussed in the House of Commons. Some plants have provided part-time employment for women who are unable to be away from their homes for a full day's work. The length of the work-week and the time of the shifts vary from plant to plant, but the plan has proven practicable and has gained support. Efforts are being made to greatly expand job opportunities of this kind.

Both the new entrants into industry and those previously employed at jobs requiring little skill have had the opportunity to secure training and the rates of pay for trainees have been made so attractive that there is no loss in earning power in the period of preparation for higher-grade employment.

From the beginning of the armament program the Government sought an agreement in the engineering industry for the dilution of labor to permit upgrading of the unskilled and women to work of higher skill, and to bring workers into the industry. As war approached, a voluntary agreement permitting dilution was reached on August 31, 1939. In May 1940 it was decided that women filling boys' and youths' jobs should receive the boys' or women's rate whichever was greater. Where women engaged in men's jobs they were to serve an 8-week probationary period at the women's national wage; at a higher rate for 12 weeks; and at a still higher rate for 12 more weeks. If they qualified at the end of 32 weeks they were to be paid the same as the men they replaced. A woman fully qualified for the man's job at the outset would not be required to serve a probationary period. There are indications that women are not replacing men in the same jobs at the same pay to a great extent as yet.

The Government adopted a scheme in 1940 to expand its training facilities. The closest cooperation was developed between the centers and employers. Employers were encouraged to train workers in their own workshops. Instruction is given to persons with no skills and those having some skill who may thereby be upgraded. In some establishments women as well as men are taught. Employed persons are permitted to leave their jobs and enroll for training, if their jobs are not essential to the war effort. It was estimated in 1941 that from 150,000 to 200,000 workers a year were passing through government centers. Even more are trained in private industry. Early in 1942 it was announced that the number of Government training centers was being reduced from 39 to 24. While this entailed a reduction in activities it was stated that a better balance of training trades had been achieved.

Trainees are entitled to allowances from the Ministry of Labor, whether trained in government centers or in plants. Pay in plants may not exceed pay at government centers, and the men trained in the factories must be moved elsewhere when their courses are completed.

Changes in rates of pay of trainees, effective March 31, 1941, made their pay broadly equivalent to what they would have received if entering industry directly. Formerly, allowances were based on the expenses incurred during training. Now trainees are regarded as under contract of service and receive weekly wages. They are liable for health- and social-insurance contributions and are entitled to lodging allowances when away from home just as are other workers. The lodging allowance is 3s. 6d. a night if the trainee continues to maintain a home in the area from which he came, but, if not, he is allowed the same sum daily for a period up to 7 days to help him settle in the new area. Fares are paid both ways if the trainee comes from a distance. Young trainees under 19 are given extra allowances for meals and in case of sickness.

A plan was adopted in 1941 for training and resettling disabled persons of either sex over age 16, regardless of the cause of disablement. Foreigners disabled since the war began are eligible, whether or not the disability is the result of enemy action. Courses are given in certain government centers, at institutions experienced in training the disabled, at technical colleges and schools, and in industrial establishments. The allowances for the disabled are lower than those for able-bodied trainees.

Arbitration of Industrial Disputes

Organized labor experienced a temporary loss of prestige after the general strike of 1926 and the enactment of the Trade Disputes and Trade-Unions Act of 1927, forbidding unions to coerce the Government and outlawing sympathetic strikes. Once public confidence in the unions was restored they assumed new importance. A great deal of effective machinery for the settlement of industrial disputes established by joint arrangements of employers and employees was in operation at the beginning of the present conflict. For industries and trades that were not well organized, negotiation of industrial differences was possible with Government assistance. Con-

ciliation, arbitration, and inquiry into disputes were provided for under the Conciliation Act of 1896 and the Industrial Courts Act of 1919.

Strike activity in 1940 was at the lowest level in the nearly 50 years of official British statistics. Nevertheless, an order in council was issued in July of that year granting the Minister of Labor power to issue orders designed to prevent the interruption of work and to provide for an arbitration tribunal.

Employer and employee representatives expressed the desire that as far as possible the existing joint machinery should be used to settle disputes. The arbitration order (1) provides for conciliation and arbitration; (2) prohibits strikes and lockouts unless the controversy has been reported to the Minister of Labor and National Service and has not been referred by him for settlement within three weeks from the date reported; (3) obligates employers in every district to observe terms and conditions arrived at by collective agreement or by arbitration; and (4) provides for recording departures from trade practices to facilitate the operation of legislation for their restoration after the war. Nothing in the order affects the Minister's power to refer trade disputes for settlement under the Industrial Courts Act of 1919, provided both parties consent.

A National Arbitration Tribunal was formed by the Minister of Labor, consisting of five members. One employer and one employee member were to be chosen from panels of employer and employee representatives. Originally three appointed members served full time, but this did not prove practicable. By an amendment of November 14, 1941, a panel of not more than five appointed members was ordered to be created by the Minister, of whom two in addition to the chairman may be selected to sit for any hearing before the tribunal.

Any agreement, decision, or award in a case referred by the Minister, whether reached by conciliation, joint negotiation, or the National Arbitration Tribunal, is binding upon the parties, and the terms of the settlement become implied in the contract between the employers and workers concerned.

While the strike record for 1941 was not as good as in 1940 the aggregate number of working days idle owing to disputes was considerably lower than in any of the preceding 10 years except 1933 and 1934. There were 1,080,000 days of idleness in 1941 as compared with 2,450,000 in 1916 and 5,900,000 in 1918. Most of the cases referred to the new tribunal thus far have risen out of claims for wage increases. Some of the decisions, as for example, in the engineering, mining, and railroad industries, affect hundreds of thousands of employees. Under certain of the important awards the increases have been smaller than labor hoped for and under others any advance in wages was denied.

The Select Committee on National Expenditure in its twenty-first report quotes the view of the Conciliation Department of the Ministry of Labor "that, human nature being what it is, a certain number of stoppages are inevitable, and that the cessation of work may actually serve a useful purpose by bringing the parties to a full realization of the issues between them and, by forcing on them the necessity of

making a serious effort to resolve them, may accelerate a settlement." The Committee agrees that there may be a large element of truth in this statement, but, though strikes may clear the air in peace time, "in time of war when the existence of the Nation is at stake it seems hard to justify this expensive form of ventilation."

Gains and Losses for Labor

British labor's surrender of mobility and free choice of occupation was preceded by a driving effort to raise war production by abandoning normal working schedules. Daily and weekly hours of work on war production were lengthened to the limit after the fall of France and the evacuation of Dunkirk. Holidays were canceled and vacations with pay were either given up or postponed during the summer. Workers were urged to work a 7-day week without adequate rest periods and schedules up to 12 hours daily and 84 hours weekly were observed in munition plants. Normal peacetime hours in most industries were 44, 47 or 48 weekly.

Although the pace could not be maintained for long, a large volume of replacement was made for the guns, tanks, and other equipment lost on the Continent. This tremendous effort was made in response to a plea from the Minister of Labor in the newly established Churchill Government in May 1940. It was at this time that the wholehearted cooperation of labor was obtained. Previously, organized workers had refused cabinet office.

When the ill effects of overtime became pronounced, that is, in lowered productivity and increased absenteeism and illness, the Minister of Labor proposed a scheme for gradual reduction in working time under a system of rotation to a maximum of 55 or 56 hours weekly. While hours worked are below the level of the summer of 1940, there is further need for adjustment by the addition of more shift work and new employees. Sunday work, at higher overtime rates than are paid for weekday overtime, is especially opposed by the Select Committee on National Expenditure on the grounds that it raises costs of production unduly.

As the hours of men, except in specially hazardous occupations, are not limited by law, working time continues to be fixed by agreement of employers and workers. For women and young persons maximum hours were established under the Factories Act of 1937, but several orders have been issued during the war permitting extensions. The latest of these, adopted on January 23, 1942, permits women and young persons aged 16 or over to be employed 55 hours a week instead of 48 as provided by law; younger persons may work not more than 48 hours weekly in place of the 44 hours specified by law effective on July 1, 1938. Authorization for the extension of hours may be given by factory inspectors. An order for the pottery industry, promulgated a month earlier, established a 53-hour maximum. In both cases the change was made with reluctance and only because of the acute war need.

A special body—the Industrial Health Research Board—deals with the problem of maximum production in relation to the health and efficiency of the workers. In its second report giving the results of an investigation of conditions in munition factories

from the outbreak of war to the end of June 1941 the Board concludes that time lost by factory workers through sickness, injury, and absence without permission tends to vary with the weekly hours of work. It was usually low when the weekly hours were less than 60 but rose as the hours increased up to 75. Over an extended period weekly hours not to exceed 60 to 65 for men and 55 to 60 for women were suggested on the basis of the findings. Although it was not possible to maintain the high level of productivity obtained in the spurt after the fall of France output had remained higher than in the previous period in nearly every case.

Women, on the whole, lost more time than men. Domestic responsibilities were an important cause. Time-keeping by factory personnel was deserving of praise, in the opinion of the Board, considering the difficulties of transport and the losses of homes, working time, and rest owing to air raids. It was not possible to measure exactly the time loss because of sickness, injury, and absence without leave but it tended to increase as the war continued. The average time loss from these causes was 7.1% and for absence without permission alone, 3.7%.

Money wages are higher in Great Britain than at any previous time. Rates of pay have advanced and there is full employment with a great deal of overtime worked at rates above the normal hourly pay. Many families have more than one wage earner now that all able-bodied persons are urged to work, but in families where the chief breadwinner is in the armed services the family income is likely to have shrunk. According to a government survey for 16 manufacturing and non-manufacturing industries in Great Britain and Northern Ireland, weighted average weekly earnings were 75s. 10d. in the week ended July 12, 1941. This was an increase of 42.4% over the last pay week of October 1938. Men's earnings rose by approximately the same amount (44.1%) from 1938 to 1941 as those of all workers (42.4%). The most striking advance was that of youths and boys (60.7%), as a result of which their average weekly earnings in July 1941 (41s. 11d.) were within 2 shillings of women's earnings (43s. 11d.). Women's and girls' earnings rose only 35.1%.

In transferring male and female workers the Government has tried to prevent financial loss to them by making special allowances, administered by the Minister of Labor. Payment of a lodging allowance may be made to a married man sent to a new area as long as he maintains his home in the area from which he came. A "settling-in" grant may be made if the worker does not receive the lodging allowance. Women receive an extra sum at the end of the second week of employment. A "continuing liability" allowance is provided for persons who, having taken their families to the new location, are not eligible for the lodging allowance. This is to aid them in meeting rent, taxes, mortgage interest, or furniture storage in the old area, when they are unable to terminate liabilities before being transferred. Workers qualifying for the "continuing liability" allowance are granted the right to obtain transportation fares for their dependents. This is in addition to the free travel warrant the worker obtains for the first journey to the new place of work and the payment for travel time if it lasts over 4 hours.

Transferred workers may borrow up to £1 from the employment exchange on reaching the new area, repayable out of the first week's pay. Government aid is given in moving the workman's family and furniture if it appears he will remain in the new location long enough and the move is desirable.

A positive national wage policy has not been adopted. Concern was expressed by the Government in 1941 lest the steady upward trend of wages contribute toward inflation, now that civilian goods are restricted in quantity. It sought the adoption of a plan that would permit wage rises in meritorious cases where inequities exist but would stop general increases. In answer the Trades Union Congress held that some inflation is inevitable in wartime and that any serious attempt to solve the problem should begin by curtailing working time, thus increasing productivity and benefiting the health and well-being of labor while lowering workers' incomes by reducing the volume of work at overtime pay. At the same time further price controls, rationing, control of profits, and lending of savings to the Government were advocated.

Price controls and rationing have not stopped price rises, but the rate of increase was far smaller in 1941 than in 1940. Controls consist of centralized purchase of imported foodstuffs, limitations on distributors margins and retail selling prices, and direct subsidy of certain articles of food. Clothing, many important foodstuffs, and soap are rationed.

Cost of living as measured by the official index numbers, using July 1914 as a base of 100, rose approximately 29% from September 1939 to January 1942—from 155 to 200. Of the 45-point rise, 2¾ points represent the effect of increased taxes on sugar, tobacco, and cigarettes, and matches, and some 6 points resulted from the sales tax. Throughout 1941 the index ranged within a 5-point limit of 196 to 201. It was 200 in January 1942. Rents have been kept stable throughout the war by rent-restriction legislation; foods advanced over one sixth; fuel and light over one fourth; other items nearly one third; and clothing nearly doubled in price.

Enforcement and Administration

Enforcement of wartime legislation and regulations has not been a serious problem for the Government. There have been some illegal strikes, resulting in sentences for those responsible. In the recruitment and transfer of workers the Ministry of Labor followed the policy of securing voluntary action. It was necessary to direct persons into jobs only in exceptional cases and up to the middle of 1941 there had been only 32 prosecutions of which 29 were decided in the Government's favor. The policing necessary under the essential-work orders has been carried on within industry. Where employees wish to appeal employer decisions they have recourse to government machinery but there is no intent to interfere with joint employer-employee arrangements.

Knowledge that worker representatives participate in the formulation and execution of war policies stimulates labor in its war efforts. Far greater responsibility has been placed upon the Minister of Labor than in the last war. The office was redesig-

nated as the Ministry of Labor and National Service in September 1939. A labor representative, who became Minister in May 1940, when Prime Minister Chamberlain was forced out and the Labor Party agreed to join the Government, has continued in this post since. Powers of other government departments, as, for example, under the Factories Act, were assigned to the Ministry for the duration of the war. The labor exchanges are the key for the clearance of workers and the expansion of the Ministry has been built about them.

Committees representing organized employers and employees advise the Minister of Labor and there are similar committees for regional boards and other government departments. Before the Minister of Production was appointed early in 1942, absorbing the duties of the Production Executive, the Production Executive and its regional boards had advisory committees of employers and workers. Thus, both parties to industry have the opportunitiy of expressing their views on policies in the making and may secure adjustments that will prevent untold difficulties in carrying out production and other plans. With government approval joint production advisory committees are now being formed in individual plants to encourage increased output.

DOMINION WAR MEASURES

Whether the basic war legislation was enacted by the British Parliament for the possessions, or by the Dominions to apply within their own territories, the emergency powers of the early war period were similar to those applied in the British Isles themselves. Both Australia and New Zealand adopted emergency powers acts in 1939 which were later extended. In Canada the War Measures Act of 1914 enabled the Government to take the immediate measures needed in organizing the war effort and new legislation was not enacted until 1940. As Australia, Canada, and New Zealand, the countries for which labor measures are described, were not highly industrialized as compared with Great Britain at the outbreak of war, the training of workers and erection of war plants raised acute problems. All three countries were large exporters of raw materials or pastoral products and prior to hostilities depended upon imports of many manufactured goods.

Australia

The National Security Act providing for the safety and defense of the Commonwealth of Australia and its Territories was passed in September 1939 and amended in June 1940. The act empowered the Governor-General to make regulations covering specific conditions relating to the public safety and defense. The amendment authorized the issuance of regulations "requiring persons to place themselves, their services, and their property at the disposal of the Commonwealth," although any form of compulsory service beyond the limits of Australia could not be imposed. No form of compulsory naval, military, or air-force service could be required, nor any form of industrial conscription.

As a result of the growing seriousness of the war situation in the Southwest Pacific, new manpower regulations were put in effect by the Australian Government

early in February 1942, providing for stabilization of prices and individual wages and wage rates for industries. Wages may not be raised from existing levels, but the arbitration court and other wage-fixing tribunals may permit the completion of existing negotiations and wage adjustments. Adjustment of wages to the cost of living will be continued. All employment must be obtained through government labor bureaus and no employee may change to a new job in any type of work, whether protected or not, unless the prospective employer has the sanction of the national service office. Arbitrary dismissal of employees essential to industries is prohibited. Drastic penalties are imposed on persons absent from work except for prescribed reasons (such as sickness).

All men between the ages of 16 and 60 were required to register in April 1942 and there is compulsory organization of men in labor units for urgent war work. In the public interest the Prime Minister may direct any person, either individually, collectively, or sectionally, to perform any service or duties of which he is capable.

Australia's first list of reserved occupations exempting men from military service, issued in November 1940, classified occupations under three main heads—those of direct importance to war, those of importance for munitions or essential commodities and services for the troops and civilian population, and those in which skills can be converted readily to use on war work. Control over the issuance of certificates of reservation was vested in a central manpower committee and subordinate officers. Reservation was extended to all branches of the armed services and prevented men affected from enlisting or being called, except in their technical or trade capacity. The list has been under continuous review.

Prior to the new manpower regulations the labor force of munitions industries was protected. The National Security (Employment) Regulations of 1940 forbade an employer not engaged in producing or reconditioning munitions to hire, without a special permit, any employee in the metal and the motor-vehicle trades. Partly to restrict competitive bidding among employers in these industries, employers were prohibited from paying skilled employees engaged in munitions manufacture or plant maintenance a higher or lower marginal rate of pay above the basic wage than is specified in regulations. However, "merit money" and special allowances granted under an award could be continued.

At the outbreak of war there was a particular shortage of fitters, turners, machinists, and tool and pattern makers. A survey of the country's facilities for training and retraining workers was made almost immediately with the view of developing short and intensive training courses. Power having been given to the Minister of Labor to make training arrangements, it was decided to use the technical-education schools by expanding their capacity. Workers were taken into the schools in larger numbers to be trained both for the armed forces—particularly for ground work with the air force —and for essential industries. The courses provided for instruction of persons with no previous knowledge of engineering work or munitions manufacture and for upgrading of workers with some skill. By the end of 1940 about 150 technical colleges

were giving courses lasting about 8 weeks, with 40 to 48 hours of instruction per week. Men and boys 16 years of age and over and women of 18 and over are eligible. Trainees qualifying as munitions workers are paid the basic wage for a 44-hour week, and work day and night shifts in alternate weeks.

The creation of the Federal Department of Labor and National Service in 1940 facilitated the extension of the plans for technical training, as branch administrations were established in the states to help solve problems involved. Some difficulty was met at first in expanding the apprenticeship program, as the trade-unions objected to any unnecessary increase in apprentice training and to any relaxation of apprenticeship standards.

Dilution of skilled labor has been carried out by agreement between the Commonwealth Government and the organizations of employers and workers concerned. Power to arrange for the training of munition workers was first vested in the Minister for Supply, then in the Department of Munitions, and subsequently in the new Department of Labor and National Service.

In 1940 the Government and representatives of the munitions industries agreed that all competent tradesmen should have preference in employment regardless of age, and that no recognized tradesman might be discharged for lack of work while any tradesman brought in under these agreements remained in employment. When skilled labor becomes available the original trade practices must be restored. Registers of all added tradesmen must be kept and particulars supplied to the union and the employers' organization concerned. The schemes are administered by central committees representing the Government, employers, and trade-unions, and by tripartite local committees working under the central committees.

The agreements did not apply to women, but their application to women in engineering has been discussed. In May 1941 about 700,000 of the approximately 3 million Australian "breadwinners" were women. Arbitrary lines have often been drawn between men's and women's work and rates of pay have been lower, in general, for women. The expanding munitions industries together with the growing scarcity of men led to a great increase in women workers. Some union leaders stated that they would not oppose the employment of women if they were paid the same rates as men. After Pearl Harbor plans went into effect to replace 30% of all aircraft workers by women, as the Government moved to double aircraft production as the principal national necessity. As of March 2, 1942, a regulation provided for the employment of any female on munitions work at rates to be determined by the Ministers of Munitions and Aircraft.

Since passage of the Commonwealth arbitration law in 1904, interstate questions of wages, hours, and working conditions have been established by award of the Court of Conciliation and Arbitration. As the National Security (Industrial Peace) Regulations of 1940 removed the provision limiting awards by the Commonwealth Court to interstate cases, it may now declare that any rule, regulation, etc., in any award or order shall be a common rule of any industry in which a dispute arises, or of any

part of that industry, or of any group of industries of which that industry is one. Such an award is binding to the extent declared by the Court.

The Commonwealth law in Australia outlaws strikes for persons covered by existing awards or agreements. In the pre-war period the labor legislation of all but one state in Australia limited the right to strike. Yet the number of man-days idle owing to strikes averaged 660,000 annually from 1935 to 1939. In 1940 strikes involving 192,597 work-people resulted in a loss of 1,507,252 working days. As a means of strike prevention the war regulations provide that the Arbitration Court may determine a matter in dispute even though no strike has occurred.

The Conciliation and Arbitration Court may set rates of wages and hours in pursuance of its function of preventing and settling industrial disputes. The basic wage fixed by the Court is composed of two parts—the "needs" basic wage and the "prosperity loading." The former is periodically adjusted as changes occur in the cost of living and varies according to locality. Variations in the "loading additions" depend upon the rise and fall of prosperity. The Court also establishes secondary rates for certain categories of unskilled workers and semiskilled and skilled labor.

Working hours are fixed by the Court under its general powers in all of its awards. The 44-hour week is the prevailing maximum under awards. The weighted average working hours a week for all Australian industries, exclusive of shipping and rural pursuits, was approximately 45 in 1941. Owing to the seriousness of the situation a large amount of overtime work is being performed at rates of pay above the normal.

Operation of the Australian industrial system depends very largely upon the organization of workers in trade-unions and employers in associations. While the Supply and Development Act of 1939 empowered the Government to regulate the establishment, maintenance, or operation of factories for the supply of munitions, it did not deprive a trade-union or member of any rights accorded by earlier legislation. Under the sweeping regulations now in effect these rights are in abeyance.

Labor has shared in the administration of the Government's war policy. Its position was strengthened when a Labor Government was placed in power in September 1941. Representatives of labor are included in advisory state committees on price control and on the state area boards of management created by the Department of Munitions. More significant, however, as examples of joint control are the labor-dilution agreements made by the Government, employers, and unions in certain trades. A Trade Union Advisory Panel was formed in July 1940 to advise the Government as to industrial and employment conditions, and in July 1941 labor was represented on the new Manpower Priority Board.

The high level of employment in 1940 was reflected in demands for wage increases. Special "war loadings" were added to workers' wages but the 1942 manpower regulations put a stop to pay advances for the duration of the war.

Commodity price control has been gradually extended since the outbreak of war. It has been highly successful and has met with less resistance than some of the other

economic measures. The only commodity rationed for civilian use up to April 1942 was Ceylon tea.

Canada

In Canada the earliest steps for the organization of the country for war were taken under the War Measures Act of 1914. Three measures of particular importance to labor were adopted in 1940. On June 21 the Canadian National Resources Mobilization Act required persons to place themselves, their services and property at the disposal of the Crown for the defense of the country and the prosecution of the war. These powers did not require armed service outside the territorial limits of Canada. The Department of National War Service Act of July 12 provided for such a Department, under the Minister of Agriculture. Its duties were to register the population and to promote voluntary organization and coordination of the war effort. By order in council of July 2 the Wartime Industries Control Board was set up and provision made for controllers for the leading industries. This body was charged with organizing the sources of supply of munitions and mobilizing economic and industrial facilities as related to munitions.

From the outset of war the Canadian Government placed its main emphasis upon price control. A Wartime Prices and Trade Board was established by order in council of September 3, 1939 under the authority of the 1914 Act. Its action prevented buyers' panic, speculation, runaway prices, and rent rises early in the war. Other governmental agencies also operated in the price field, and a sweeping order was promulgated on August 29, 1941, centralizing control over prices in the Wartime Prices and Trade Board. The Board may prescribe conditions of sale of any goods or services, fix quantities to be bought or sold, and license handlers of foods, feeds, clothing, millinery, footwear, and furs, and cancel or suspend licenses. Provision was also made for unifying control over war industries under the Wartime Prices and Trade Board and also the Wartime Industries Control Board. Thus, the general price-fixing body shares in regulating war industries.

By the Price Ceiling Order effective December 1, 1941 prices were limited to the maximum in the base period of 4 weeks from September 15 to October 11, 1941, inclusive. Civilian rationing of sugar was introduced in January 1942 and of gasoline on April 1. Originally the sugar scheme was operated under an honor system and later subjected to coupon rationing.

A wage policy was formulated by order in council of December 16, 1940 to guide the various Canadian conciliation boards in establishing cost-of-living bonuses. An order of wider scope was issued on October 24, 1941, designed to supplement the Government's anti-inflation policy without imposing undue hardship on wage earners. It provided that basic wage rates were to be frozen at the level of November 15, except that unduly low or high rates could be brought into line with prevailing rates for the same or similar occupations.

At the same time all employers not specifically exempt were ordered to pay a cost-of-living bonus on basic wage rates, calculated according to changes in the official

index of cost of living. The bonus may not raise wages above prevailing levels and is subject to the employer's ability to pay. August 1939 was made the base period of 100 and for every rise or fall of 1 point employers were required to adjust the cost-of-living bonus. For each quarterly point of change the adjustment is 25 cents a week for adult males and for others earning $25 a week and over. For females earning less than $25 weekly and males under the age of 21 the adjustment amounts to 1 percent of the basic weekly wage.

Originally small establishments were excluded, but an order of December 5, 1941 extended application of the cost-of-living bonus to employers of one or more. Employees of Federal and Provincial Governments and municipalities were exempt. Cost-of-living bonuses for salaried workers were provided by separate order.

According to preliminary figures issued by the Department of Labor the increase in wage rates from 1939 to 1941 ranged from 8.1% in the building trades to 13.7% in the metal trades and in logging and sawmilling, while the rise for common factory labor was 15.6 percent. The official index of cost of living—using 1935-39 as a base of 100—was 101.5 in 1939 and 115.4 in January 1942.

Limitations on working hours imposed by the Fair Wages and Hours of Labor Act were removed on August 15, 1940. The 8-hour day and 48-hour week were suspended in building construction and defense projects in specified localities and the Minister of National Defense was authorized to extend suspensions to other localities. Long hours are prevalent. In mid-March 1942 the Minister of Labor urged that industrial operations be placed on a 7-day basis but with proper rest periods for the workers.

Before the war started a study of reserved occupations had been made by an interdepartmental committee. Soon after the declaration of war recruiting officials were directed by the Department of National Defense not to enlist skilled tradesmen except to the extent required in their particular trade capacity. Persons employed in the essential services of Canada were also exempted.

The supply of men for military duty was insured by new regulations effective March 23, 1942, under which males aged 17 to 45 years, inclusive, who are physically fit for military service, were restricted from entering nonessential work or work that could be satisfactorily done by women or older men. Men may be released from agriculture for military service under order of the same date but may not enter nonagricultural employment. Written permission from a national service officer is necessary if an essential agricultural worker is to leave the industry.

Control over labor has been limited largely in connection with conscription for the military services within Canada and regulation of prices and wages. Compulsory overseas services, referred to the voters in a plebiscite held on April 27, 1942, was voted by a large majority. While the right thus acquired may not be exercised immediately—owing to the high rate of voluntary enlistment—the Government now has authority for any future action leading to complete mobilization of manpower.

Under the Industrial Disputes Investigation Act of 1907 as amended prior to the

war, 30 days notice of proposed changes in working conditions was required; strikes and lockouts are illegal pending referral of a dispute to a joint conciliation board and a report from the Minister of Labor; and awards are not binding except by previous agreement of the parties concerned. Application was limited to mines, transport and communication, and certain other public utilities. Except in British Columbia and Prince Edward Island the Provinces gave the Dominion jurisdiction over disputes in these industries.

Amendments to the disputes law made in 1939 and 1941 extended coverage to defense projects and all industries producing munitions and war supplies and made changes to improve its operation. In late 1941 other amendments provided that a strike could not be called unless all the workers involved had the opportunity to consider it. Strikes were restricted even after a board of conciliation had presented its finding. Labor was required to report a proposed strike to the Minister of Labor who can, in his discretion, require a strike vote among the union membership. Majority approval is necessary.

Days of idleness through industrial disputes aggregated 319,466 in 1941 as compared with 266,318 in 1940, 224,588 in 1939, and 886,393 in the peak year, 1937.

Since there is no general mobilization of manpower order, labor is placed by a number of devices. As a guide to placement a register of skills was established through registration of the population aged 16 years and over in August 1940. Workers covered by the Industrial Disputes Act and persons of designated and scarce skills may not be enticed from their employment by other employers. The labor force has been augmented by women. They are performing work formerly done by men in some cases. Their proportion in the total labor forces ranges from 3 to 60% in the different war industries. To encourage the transfer of labor to a point where it is most needed, transfer allowances were authorized by order of August 13, 1941. Loans up to $10 may also be made to meet expenses during the first week following any change. Trainees for war industry have been supplied by the Federal-Provincial youth training program which was altered to meet the emergency and through special training facilities set up by the Dominion Government.

Trade-union membership is relatively small in Canada. There is no central federation as some unions belong to the American international organizations, others are independent, and some are grouped on the basis of religious affiliation. Organized workers in Canada are not in full accord with the various labor controls, although wholehearted support of the war effort has been pledged. A major reason for dissatisfaction is the operation of the machinery of arbitration and conciliation and a review of the terms of the law is sought. Free negotiation between employers and employees has been advocated in fixing wages and disapproval expressed with the wage freezing orders which labor believes should not have been made without consulting the workers and obtaining Parliamentary approval.

New Zealand

When New Zealand entered the present war, industry was operating under a statutory 40-hour workweek, and wages were established under the arbitration system operative since 1894. Arbitration of industrial disputes was compulsory, as was also union membership for workers over 18 years of age receiving the minimum rate of pay for adults under an award or industrial agreement. At the beginning of the war, a labor government had been in office 4 years. It has continued without interruption for a total of nearly 7 years. New Zealand moved toward industrial rationalization and industrial planning, with the enactment of the Industrial Efficiency Act in 1936. The Bureau of Industry, which administers this law, recommends changes in the organization of industry, the standardization of materials, processes, and products; the training and supply of workers; the marketing of products and the purchasing of materials; and issues licenses to industries to operate. A person may be prohibited from engaging in any industry without a license, an industry covered by such an order being known as a "licensed industry." In passing upon applications for licenses special consideration is given to existing and future demands for the product, avoidance of surplus plant and capital, and the experience and capabilities of the applicant. The final objective is to formulate an industrial plan for the organization of an entire industry or related industries, establishing fair trade practices as was done under NRA codes in the United States.

Service in the militia in time of war was required of male persons between the ages of 17 and 55 years, prior to the present conflict. An order in council of June 18, 1940, issued under the National Service Emergency Regulations of 1940 under authority of the Emergency Regulations Act of 1939, made national service obligatory for all residents of New Zealand over 16 years of age, regardless of sex, and governs the conditions under which they may be called for service in the national interest. The Minister of National Service was empowered to direct any person covered to perform work of national importance in New Zealand. The terms of pay and conditions of work were to be the same as were applicable to similar work under laws, regulations, awards, or industrial agreements; or, if provisions were absent, they were to be established by the Minister of Labor. Persons called for work under these regulations were required to notify the Director of National Service if they ceased to be engaged in any essential occupation or if they changed employers or ceased to be employed. Employers were also required to give notice of changes.

More extensive authority to alter conditions of employment was also granted by order in council of June 18, 1940. The Minister of Labor was granted power to suspend by published order the provisions relating to conditions of employment of any act or regulations, or of any award or agreement under the Industrial Conciliation and Arbitration Act of 1925, or of any agreement under the Labor Disputes Investigation Act of 1913, or of any voluntary agreement. The Minister may prescribe substitute conditions of employment.

The National Emergency Regulations of 1940 were amended in May 1941, extending the powers of the Minister of National Service to include the direction of individuals into training for any work or service in the national interest; the control over employment to prevent the hiring of specified workers; and the registration of employers and workers in specified industries or occupations.

By an amendment (No. 8, 1942) of the National Service Emergency Regulations of 1940, effective January 13, 1942, the Minister of National Service was accorded power to control manpower in essential industries as soon as he declares them to be essential. Two objectives are aimed at—conservation of labor in essential industries and mobilization of additional labor resources.

District manpower officers must give written consent before employment may be terminated by either employer or employee. It is not intended to stop all movements of labor in essential industries; the purpose is to keep it at a minimum, thus giving industry the greatest possible stability. The free flow of workers into essential industries will be permitted, but movement out will be subject to review. Registration of the entire population may be required. In announcing the regulations the Prime Minister of New Zealand stated that it was necessary to make heavy withdrawals of men for defense purposes, while imposing further demands on war production industries. Even in essential industries key men called up for military service must obtain postponement by appeal to boards and committees.

New Zealand used a list of reserved occupations for deferring or exempting workers from military service to continue to perform vital civilian work. Individual appeals have been dealt with on their merits, and no occupation has been completely or permanently reserved. Joint local manpower committees were empowered to hear deferment cases and could refuse a man to the military service but could not prevent him from giving up his job. The Industrial Conciliation and Arbitration Act of New Zealand was amended on July 18, 1939. Additional penalties were imposed on unions, employers, or workers for participating in work stoppages violating the provision for compulsory arbitration of industrial disputes. By registering with the Government, unions accepted the principle of compulsory arbitration, and the amended law empowers the Minister of Labor to cancel the registration of the union or an award or industrial agreement relating to it, if he is satisfied that a work stoppage will cause serious loss or inconvenience. Workers were also barred from protection of compulsory union membership in the future if their registration was canceled. Formerly fines were imposed on unions or individuals for participating in illegal strikes or lockouts but they were difficult to collect.

Emergency anti-strike regulations were promulgated in October 1939. Work stoppages and inciting other persons to strike are offenses against the regulations. In industries covered by award or agreements, machinery maintained for this purpose is to be invoked in settling matters in dispute. The Minister of Labor may name an emergency disputes committee of seven members to handle other disputes. In either case the decision is final.

In the first 9 months of 1939 there were 61 strikes in New Zealand, involving 12,747 workers. The average duration of strikes was 3.24 days and the days of idleness resulting aggregated 24,020. For the same period in 1940 the number of strikes was 44, the number of workers involved 8,709, the average duration of strikes 8.13 days, and the days of idleness totaled 19,667. Strike activity in January to September 1941 was at a higher level than in each of seven calendar years during the period 1926 through 1940. Coal mining occupied first place in number of disputes, workers involved, and days idle.

In meeting the shortage of skilled labor the usual devices were resorted to, that is, shortening the terms of apprenticeship and vocational-training programs and providing special courses in technical schools and colleges. The Government, to make possible the rapid and intensive training of large numbers of additional workers, adopted the Auxiliary Workers' Training Emergency Regulations of 1941 (No. 23) under the Emergency Regulations Act of 1939. The order authorized the Minister of Labor to appoint a council, composed of employer, worker, and Government members, to formulate and execute plans for training.

Persons trained under the Government scheme are classed as auxiliary workers and "shall not be engaged whilst there is a qualified worker in the same class out of employment on the register of the local union, and no qualified worker shall be dismissed merely by reason of the fact that an auxiliary worker has been engaged." Progress was reported by the Minister of Labor in June 1941. Classes had then been established in each of the chief centers in New Zealand to train workers for the munitions and engineering industries. Workers were not recommended to employers unless they had had 16 weeks of training. Selectees for training must be over 21 years of age and either ineligible for military service or married and with one or more children.

Training for national service is under the authority of the Minister of National Service, who was empowered by regulation of May 14, 1941, to direct any person to undergo training fitting him for such service. The Minister may prevent employers in specified industries from attempting to engage a worker except through a placement officer; may prevent workers from obtaining employment without approval of a placement officer; and may prevent employers from obtaining certain classes of workers.

Under the emergency powers, minimum rates of pay may be varied as required. A similar exception was made in 1918-23 and again in 1931-32. Normally the Court of Arbitration cannot vary wages during the terms of awards. Although the Court has granted increases in minimum wages since the outbreak of war, support has been sought from organized employers and workers in keeping wages stable. An Economic Stabilization Conference, called by the Prime Minister in 1940, recommended a pay-as-you-go policy and an increase in production as the keystone. Stabilization of prices and wages was also endorsed by the Federation of Labor at its 1941 session. While it has not been possible to maintain prices at pre-war levels, profit

margins per unit have been fixed at those levels under the price-control regulations adopted September 1, 1939. Prices as of that date must be maintained unless prior consent to the change is given by the Price Investigation Tribunal. Hoarding of goods is forbidden. The Tribunal's functions were later broadened to issue price orders and, generally, to oversee the price situation. Effective September 1, 1941, the prices of essential foodstuffs, standard articles of clothing and footwear, and public services were fixed.

Official index numbers show that weekly money wages of adult males advanced from an index of 1,100 in 1939 to 1,130 in 1940 and 1,170 in 1941. The retail price index was 990 in 1939, 1,035 in 1940, and 1,072 in 1941. Both sets of indexes are based on the average of 1926-30 as 1,000.

The provision of 1936 that the 40-hour workweek should be the maximum under awards and agreements in industry except where employers could show cause for exemption was waived by a defense regulation in September 1939. At the conference of the New Zealand Federation of Labor in April 1941, an application from the New Zealand Employers' Federation for a general extension of statutory hours to 44 from 40 was refused. The Federation would not agree to any general extension of hours but agreed to continue to lengthen working hours when essential.

In January 1942, after Japan entered the war, an 11-hour 7-day week was being worked in key munition factories in New Zealand. In machine shops, where continuous and exacting work was beginning to tell on some of the men, hours were being reduced to 72 a week.

With the lengthening of working hours it became necessary to adjust overtime rates of pay. The Overtime and Holidays Labor Legislation Suspension Order of December 17, 1941 provided that overtime rates of pay should be one and one-half times the regular rate up to 4 hours daily (3 hours on any day for which it is provided by agreement) and 16 hours weekly (12 hours where the 3-hour limit applies). Double time is payable thereafter and for work on holidays. Payment at double the ordinary rate on special holidays was substituted for the treble-pay rate previously in effect. The Minister of Labor stated that in normal times special holidays and overtime rates had been fixed as a penalty to restrict work which is now necessary.

Under the Factory Industries Labor Legislation Suspension Order of December 18, 1941, the provisions of factory legislation, awards, and agreements were waived insofar as they operate to restrict work of women and boys in factories. Women and boys may not work more than 12 hours of overtime in any week.

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LABOR MOBILIZATION IN THE NATIONAL SOCIALIST NEW ORDER

FRANZ NEUMANN*

The white race can maintain its position in practice only if the differences in the living standards in the world are retained. Give to our so-called export markets the same living standards that we have, and you will find that the preponderance of the white race, which is expressed not only in the political might of the nation but also in the economic position of the individual, can no longer be retained.

Thus spoke Adolf Hitler to an audience of Rhineland industrialists on January 27, 1932—one year before he came to power.[1] In October, 1941, Ernst Poensgen, president of the United Steel Trust, celebrated his seventieth birthday. On behalf of Adolf Hitler, the Minister of Economic Affairs presented him with the Order of the Eagle accompanying the presentation with the following speech:

With the overthrow of bolshevism and the development of the vast Eastern European continent, entirely new and extremely favorable prospects for German business will be opened up. This applies also to the German iron industry. This expansion also offers possibilities for a revision, long overdue, of price and profit policy in the coal and iron industries. . . .[2]

Better than the many ideological treatises on *Lebensraum*, geo-politics and racialism, these two statements reveal the kernel of the National Socialist doctrine: it is the old German imperialism with new methods, new techniques and new ideologies. It aims at subjecting Europe to the total economic control of German industry and reserving the exploitation of that vast continent exclusively for German masters. But economic exploitation by economic means alone, or by the methods of liberal democracy, or even of Wilhelminian absolutism, is no longer possible.

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[1] VORTRAG ADOLF HITLERS VOR WESTDEUTSCHEN WIRTSCHAFTLERN IM INDUSTRIEKLUB ZU DÜSSELDORF AM 27. JANUAR 1932 (Munich, 1932) 13, quoted from the author's BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM (New York, 1942) (hereinafter referred to as "BEHEMOTH") 183.

[2] Berliner Börsenzeitung, Oct. 18, 1941, quoted from INTERNATIONAL TRANSPORT WORKERS' FEDERATION BULLETIN No. 23, *Fascism*, Nov. 10, 1941 (hereinafter referred to as "I. T. F. BULL.").

Both the domestic situation and the political structure of Europe made it impossible to maintain total economic supremacy without corresponding total political supremacy. Internal conditions made it impossible since the German people were unwilling to resort to aggressive war in order to establish their supremacy.[3] War today is total war, requiring the total organization of society even in times of peace. Even the legal distinction between war and peace is being slowly abandoned. Peace seems merely a preparatory period of war. A total organization of society for aggressive war cannot be achieved within the framework of political democracy. This is the view of General Ludendorff as of J. A. Hobson.[4] Nor can war today be organized by mere absolutism, that is, by the establishment of a central economic machinery independent of the social forces underlying it. Total war requires total ideological, economic, social, and military organization of society; it makes necessary the complete control of every aspect of social and private life. This, obviously, cannot be achieved by a bureaucracy which, to be effective everywhere, would have to expand to an unprecedented size. In consequence, a number of mechanisms have to be built up: business organizations for the complete control of business; the military machine; the civil services for the swift and efficient execution of the commands of the top leadership; and a monolithic party for *"Menschenführung"*—for the indoctrination and manipulation of the masses of the people.

Hitler's Düsseldorf speech of 1932 contains the kernel of the doctrine of racial imperialism,[5] that is, of the theory that the present war is a war of a proletarian race against plutocratic democracies, a doctrine that was fully developed by the Italian nationalist Enrico Corradini during the Turkish-Italian conflict. It is undoubtedly the most genuine and the most dangerous manifestation of the National Socialist spirit.

This doctrine makes the war a paying proposition for the German people. It is not mere propaganda. It is even now a reality. German propaganda is never mere propaganda, it is always action and propaganda. In almost every case it contains a token fulfillment of its promises. National Socialists do not content themselves with making anti-Semitic propaganda, they actually exterminate the Jew; they do not revile liberalism and democracy, they actually annihilate them; not only do they call themselves a proletarian race engaged in struggle with plutocratic nations—but, even during the war, begin to carry out the promises of their propaganda.[6] Indeed, many groups in German society have actually profited from for-

[3] *Cf.* BEHEMOTH 185-186.

[4] See BEHEMOTH 185.

[5] On the evolution of the doctrine, see BEHEMOTH 184-218.

[6] This insight into the intrinsic connection between National Socialist propaganda and action should, rightly understood, make two things clear. *First:* No German victory has been won by propaganda; neither the destruction of democracy in Germany, nor the defeat of France are the work of superior propaganda techniques. *Second:* No mere propaganda of the Allied powers against Germany will have the slightest success unless such propaganda is backed by the beginning of performance. I cannot here dwell upon this important problem. The author has, in cooperation with Dr. Norbert Guterman, prepared a memorandum in which the principles of our psychological offensive against Germany are explained.

eign conquests. The party with its Hermann Göring combine and its Wilhelm Gustloff Foundation, its Labor Front business organizations,[7] has incorporated many industrial, commercial and banking enterprises into its own organizations. Big business has swallowed enormous slices of foreign enterprises in the process of Germanization.[8] Thousands of new positions have been created in the occupied territories filled from the rank of the party officials, thus from the middle classes whose economic independence has been destroyed by the process of monopolization which is the decisive feature of the structural changes in German economy.

All these groups have indeed benefited. They are tied to the party and to the military machine by bonds of gold. They are, thereby, also bound to the régime by a collective guilt: the spoliation of the conquered lands by army, party, bureaucracy, and big business makes every one of them a partner in a conspiracy; each of them shares the guilt of a ruthless and immoral conqueror. They must stick together to the bitter end, hoping to avert disaster by maintaining unity.

We have not mentioned the working classes, workers and salaried employees. Do they actively share in the process of spoliation? Are they members of the master race that maintains and even improves its status at the expense of the masses in the conquered territories? Or are they victims of an exploiting machine that subjects them to terror equally with the masses in the conquered countries?

This is the crucial question. It is crucial for the understanding of the origin, nature and aims of National Socialism; the answer to it must determine the character of our psychological offensive against Germany and of the peace that we want to make. The significance of the problem is well realized by National Socialists. Slogans such as "plant community," "people's community" and "anti-plutocratic struggle" are designed to capture the working classes. Yet it is precisely on this point that the National Socialist régime offers only propaganda—nothing else.

The German worker or salaried employee has received nothing from the régime except promises of a better future. He had, it is true, obtained security before the outbreak of the war. Full employment was the only achievement of the National Socialists. Yet that security is extremely ambiguous. It has paved the way for the utmost physical insecurity, namely for death. Those workers who did not know it before, know it since 1939: that economic security under National Socialism was possible only as a prelude to death. Death in the trenches, death in air raids, death in the factories as a result of physical exhaustion, death in railroad yards, chemical factories, and the like as a result of a terrific increase in industrial accidents. The connection between economic security and death is not incidental, it is essential; it springs from the very nature of National Socialism, which is an aggressive imperialist system seeking to transform markets into colonies.

How then have the working classes been integrated into the National Socialist

[7] See the detailed discussion in BEHEMOTH 298-305.
[8] *Id.* 180-184, 275-277, 386-388, 396-398.

system? Certainly not by voluntary collaboration with the régime. Even if the working classes wanted to collaborate actively, they could not do so since they are the only groups in society that do not possess organizations of their own and thus have no means of articulating either acceptance or rejection of the régime. The German Labor Front is—as we shall see—neither a trade union nor a substitute for it. It is entirely a terroristic agency of the party. Psychologically, the attitude of the workers may be described as one of passive acceptance of National Socialism, a passivity produced by the ideological and organizational collapse of the trade unions and of the working class parties, by the severe unemployment from 1930 to 1933, and by the suicidal policy of the Weimar Republic. Economically, the system makes use of the oldest capitalistic incentives to increase production, *viz.*, what is called in Germany *"Leistungslohn"*—"performance wage"—a combination of time and piecework where piecework elements predominate over time elements, a kind of streamlined Bedaux system with universal application—even to juveniles. Socially the work is incorporated into the system by terror, a terror as subtle as the system itself, by the destruction of rational, hence calculable, relations and their replacement by the unexpected.

The following discussion will deal with the control of labor not only in Germany, but in the occupied territories as well. It will be based exclusively on German materials. Some of the materials are already discussed in my book, "Behemoth," but this article will supply many additional data that have heretofore not been discussed.

I. THE GERMAN LABOR SUPPLY

For an understanding of the magnitude of the problems of labor control in Germany, some data on the composition of its working population are necessary.[9] Of the total population in 1939 of 79,400,000, approximately 39,800,000 (50.1%) were gainfully employed. The gainfully employed group was composed of 24,900,000 men (64.1% of the male population) and 14,900,000 women (36.7% of the female population). In the old Reich territory with a total population of 68,128,000, 18% were engaged in agriculture and forestry; 41%, in industry and handicrafts; 15.8%, in commerce and transportation; and 10.1%, in public and private services. Household service accounted for 2.1% and the remainder, 13%, were classed as "independents without occupation."[10] Such is the normal picture of a highly industrialized, highly monopolized, and highly bureaucratic society.

In the period 1933-1939 there had been a sharp increase (34.2%) in the total number engaged in public and private services, much smaller increases in industry

[9] The discussion is based on the results of the 1939 Census, as published in (1941) WIRTSCHAFT UND STATISTIK, No. 2; (1941) *id.* No. 3; (1941) 50 SOZIALE PRAXIS, Nos. 2, 8. The territory comprises the former German Reich, Austria (called "Ostmark") and the Sudetenland.

[10] These are essentially recipients of annuities, pensioners, persons living on their own capital, or persons supported by others not members of their households. STATISTISCHES JAHRBUCH F. D. DEUTSCHE REICH (1938) 24n.

(8.6%) and in domestic services (7.8%), and declines in agriculture and forestry (10.6%) and in commerce and transportation (3.7%). Independents without occupation also declined 1.2%. Of the gainfully employed (including their families), 7% in 1939 were civil servants, 13% were salaried employees, and 52.8% were wage-earners. These groups had increased by 10.2%, 17.1%, and 6.6%, respectively, in the period between 1933 and 1939 while the total occupied population was increasing by 3.9%.

In the boom year 1929 the total number of wage-earners and salaried employees actually employed was 17,870,000. In January, 1941, this total had risen to an estimated 22,670,000 (14,250,000 men, 8,420,000 women),[11] to whom about 2,100,000 foreign civilian workers should be added.[12] In February, 1942, approximately 24,000,000 (15,000,000 men and 9,400,000 women) were at work. To these should be added an unknown number of war prisoners, of whom there were 1,400,000 by April 1, 1941, all Polish or French.[13] This increment has brought the total to about 27,000,000.

The consideration of the problem of mobilizing this vast labor force may be organized under the following heads:

The institutional arrangements for controlling the labor market.

The devices used for increasing and distributing the labor supply.

The probable consequences of the National Socialist labor policy for the future development of Germany and Europe.

II. THE CONTROL OF THE LABOR MARKET

We are not concerned with the stages of German policy regarding the control of the labor supply. We may, with the German authority in the field,[14] distinguish four such stages and add a fifth:

(1) the general struggle against mass unemployment,[15] which has been carried out primarily by pump priming and public works;

[11] (1941) 50 SOZIALE PRAXIS, No. 5, p. 199; BEHEMOTH 508-509.

[12] The latest detailed analysis, as of Sept. 19, 1941, based on official German sources, is contained in I. T. F. BULL. No. 4, Feb. 5, 1942. It is as follows:

Poland	1,007,531	France	48,567
Italy	271,667	Hungary	34,990
Protectorate	140,052	Denmark	28,895
Belgium	121,501	Bulgaria	14,578
Yugoslavia	108,791	Miscellaneous	189,919
Holland	92,995		
Slovakia	80,037	Total	2,139,553

All the figures, with the possible exception of the Protectorate whose labor supply seems to be exhausted, have considerably increased during the past few months.

[13] 21 WIRTSCHAFT UND STATISTIK (1941) 100; Frankfurter Zeitung, Aug. 10, 1941.

[14] F. Syrup (President of the Reich Institute for Labor Exchange and Unemployment Insurance and Secretary of State in the Ministry of Labor), *Die Etappen des Arbeitseinsatzes* (1939) 48 SOZIALE PRAXIS, No. 1, p. 7; SYRUP, ZEHN JAHRE REICHSANSTALT FÜR ARBEITSVERMITTLUNG UND ARBEITSLOSENVERSICHERUNG 1927-1937 (Berlin, 1937).

[15] This aspect of Germany's efforts is very well presented by Leo Grebler, *Work Creation Policy in Germany* 1932-1935 (1937) 35 INT. LAB. REV. 331-351, 505-527.

(2) the control of the utilization of the unemployed in 1934 and 1935 with its Act of May 15, 1934, for the Regulation of Labor Supply[16] and its Decree of August 10, 1934, on the Distribution of Labor Forces;[17]

(3) the beginning of labor scarcity and the control of the natural fluctuations of labor—especially in the many regulations of November 7, 1936, issued under the authority of the Four-Year-Plan Decree and discussed herein;

(4) the securing of adequate labor supply for tasks of major political significance on the basis of the decree of June 22, 1938;[18] and we may add

(5) the complete control of the labor supply in all its aspects with the outbreak of the war by the decree of September 1, 1939, of the Ministerial Council for the Defense of the Reich.[19]

We shall not dwell on the first phase, but concentrate on the policy during the preparedness and war periods.

The institutions responsible for the increase and distribution of labor supply and the increase of labor productivity are (1) state organs, namely, (a) the labor exchanges directed by the Ministry of Labor, and (b) the Trustees of Labor, Labor Courts, and Social Courts of Honor; (2) party organs, namely, the Labor Front, the Councils of Trusted Men, the plant troops and political shock troops; and (3) a combination of both, namely, the general deputy for labor supply, the "combing-out" commissions and party district leaders. We shall devote our attention to each of these institutions in turn.

1(a). *The Labor Exchanges*

Up to the spring of 1942, the total power over the labor supply was vested in the Ministry of Labor acting through its executive machinery, the provincial and local labor exchanges, originally organs of the Reich Institute for Labor Exchange and Unemployment Insurance established by the Act of July 16, 1927.[20] The Reich Institute was a semi-autonomous institution, comprising a main office, 13 provincial labor exchanges, and 345 local labor exchanges.[21] The composition of these bodies follows the principle of a democratic and pluralistic collectivism prevalent under the Weimar Republic. They comprised representatives of trade unions, employers, associations, and public authorities controlled by the Minister of Labor. The Reich Institute performed—as its name indicates—a dual function: (1) it raised contributions for unemployment insurance, administered the funds and provided for insurance; and (2) it organized employment service. However, it had no monopoly in this. Although private labor exchanges conducted on a business basis were

[16] REICHSGESETZBLATT (hereinafter referred to as "R. G. BL.") pt. I, 381.
[17] *Id.* 786. Both devices will be discussed below.
[18] *Id.* 652, discussed below, together with the later Decree of Feb. 13, 1939.
[19] *Id.* 1685.
[20] *Id.* 187, later amended.
[21] At present there are 23 provincial (state) and 468 local employment offices. See Beisiegel, *Labor Redistribution in Germany* (1942) INT. LAB. REV. No. 4, p. 400.

prohibited as of January 1, 1931, by the order of April 28, 1923,[22] and the commercial agencies indemnified, non-profit organizations (except political organizations) such as employers associations, trade unions, and religious and charitable bodies could still act as labor exchanges. Moreover the employer could hire labor by whatever means he thought fit; he could advertise or utilize non-profit organizations or his own personnel department. The trade union demand for a state monopoly of labor exchange failed of realization under the Weimar Republic.

The changes under National Socialism affected, of course, the composition of the agencies of the Reich Institute and do not concern us here. However, the increasing necessity for close centralization of the control of labor soon led to a complete organizational change. The main office of the Reich Institute was transformed into a *"Reichsstock für Arbeitseinsatz,"* a Reich Fund for Labor Supply,[23] *i.e.*, a fund that merely administers the contributions paid by employers and employees (6½% together) and defrays the costs of the labor supply administration. The executive offices, the provincial labor exchanges and labor exchanges, have ceased to be the agents of the Reich Institute and have become direct executive agents of the Ministry of Labor.[24]

Shortly afterwards (August 1, 1939) the labor exchanges were also made agencies of the Trustees of Labor with whose tasks we shall deal later. The Trustees, to cope with the increasing amount of their work, had established branch offices which were dissolved in 1939, and their functions are now performed by the labor exchanges, now numbering 468 and staffed by about 45,000 employees.[25]

1(b). *The Trustees of Labor, Labor Courts, and Social Courts of Honor*

The power to regulate wages and labor conditions is vested exclusively in the Reich Trustees of Labor as provided for in the Act of January 20, 1934, for the Regulation of National Labor,[26] the so-called Charter of Labor. The rights of the Trustees of Labor may be grouped under the following heads: (a) they cooperate in the establishment, operation and dismissal of the Councils of Trusted Men; (b) they decide upon mass dismissals; (c) they participate in proceedings before the Social Courts of Honor; (d) they supervise the execution of plant regulations; (e) they enact and supervise wage regulations *(Tarifordnungen);* and (f) they report to the Ministry of Labor. The Trustees of Labor are thus the successors, so to speak, of the collective agreements between employers or employers associations and trade unions.

[22] (1923) REICHSARBEITSBLATT 284, later amended by Decree of Sept. 28, 1927, R. G. BL. pt. I, 318, and then incorporated in §55 of the Act of July 16, 1927.

[23] Dr. Zschucke in 1 POSSE, SYRUP, LANDFRIED, BACKE, ALLPERS, KOMMENTAR ZUR REICHSVERTEIDIGUNGSGESETZGEBUNG (hereinafter referred to as "POSSE ET AL., KOMMENTAR") (Munich & Berlin, 1939) pt. II, *Arbeitslosenhilfe*, 2.

[24] (1939) 48 SOZIALE PRAXIS, No. 15, p. 910. [25] *Ibid.* See also Beisiegel, *supra* note 21.

[26] R. G. BL. pt. I, 45. A corresponding statute was enacted on March 23, 1934, for workers and salaried employees (*not* civil servants) in public administrations and certain publicly owned enterprises (utilities). *Id.* 220.

Yet there exist a number of differences. The provisions of the collective agreements normally affected labor contracts only if both parties to the labor contracts were members of the bargaining associations,[27] though collective agreements might be extended to outsiders by an award of the Minister of Labor on application of a bargaining association. The wage orders of the Trustees, however, automatically affect all employers and employees of a designated industry or craft in a specific region. Still more important is a second distinction. Under the Republic, the collective agreement had precedence over a plant agreement concluded between the employer and the work council.[28] It is in this provision that the collective character of republican labor relations was most strongly expressed. The Charter of Labor has reversed the relation between plant regulation and wage regulation. According to Section 32, the Trustee of Labor shall issue general wage regulations for "a group of plants" only if such regulations are urgently needed for the protection of the employed. The Charter of Labor thus conceived of plant regulation and individual bargaining as the normal type of labor control, thereby expressing the one fundamental principle of National Socialist methods of mass manipulation: to destroy whatever affinities common work creates and to manipulate the working class by their thorough atomization.[29] In practice, however, the demands of a highly rationalized and industrialized society proved stronger than the ideas of the Charter of Labor. Even a slight perusal of the *Reichsarbeitsblatt,* the official periodical of the Ministry of Labor which contains all the regulations of the Trustees of Labor, shows that supra-plant regulation absolutely predominates over plant regulation. However, again a word of warning is necessary. According to the fourteenth administrative order[30] under the Charter of Labor, the Trustees of Labor may exempt "specific plants or divisions of plants or specific followers"[31] (*i.e.,* workers and salaried employees) from all or some provisions of their wage regulations. These exemptions need not be published in the *Reichsarbeitsblatt*—so that even the statistics of hourly earnings according to wage regulations lose much of their importance.

Gradually, the powers of the Trustees have been freed from the fetters of rational law. The development tended to transform the minimum wage regulation into maximum wage rules. The first basic enactment to this effect was the Decree of June 25, 1938, for the Establishment of Wages.[32] It again gave the Trustees

[27] *Tarifvertragsordnung,* Dec. 23, 1918, as re-enacted March 1, 1928, R. G. BL. pt. I, 47.

[28] Work Council Act of Feb. 4, 1920, §8, R. G. BL. pt. I, 147.

[29] On the principle of mass manipulation, cf. BEHEMOTH 400-403.

[30] German laws, normally "passed" by Hitler alone or jointly with any or all Reich Ministers, usually contain authorizations to one or more officials (as a rule, the ministers concerned) to regulate all details of the enactment by order ("Rechtsverordnungen und allgemeine Verwaltungsvorschriften" or "Durchführungsvorschriften"). Actually, of course, the laws delegate legislative authority. The regulations issued in pursuance of such delegated authority are here translated by the term "administrative order." The term "act" or "decree" is used to refer to the delegating legislation.

[31] Order of Oct. 15, 1935, R. G.. BL. pt. I, 1240.

[32] R. G. BL. pt. I, 691, issued in pursuance of the Four-Year-Plan Decree.

authority to supervise the wages and labor conditions, to enact such measures as are necessary to prevent any injury to the execution of the Four Year Plan, and to fix maximum wages even by interfering with existing plant regulations and labor contracts. Such maximum wages were fixed in the two branches most affected by labor scarcity, building construction and metal industries, so as to prevent the pirating of labor. The Decree of June 25, 1938, had but little success. Moreover, it did not interfere with acquired rights and still restricted the Trustees to the enactment of general regulations.[33]

These powers were added during the war. The Decree of September 1, 1939,[34] enabled the Trustees to enact wage regulations for individual plants, to dispense with consultation with the committee of experts (for which the Charter of Labor had provided), that is, to speed up the process of wage regulations and to differentiate as finely as necessary even within each industry or craft. The War Economy Decree of September 4, 1939,[35] has finally removed all remaining fetters.

It authorizes the Trustees, on the basis of orders from the Minister of Labor, "to adjust at once the earnings to the conditions of war and to fix maximum wages, salaries and other labor conditions by wage regulation." The Decree thus interferes with acquired rights—no matter whether derived from statutes, wage regulations, plant regulations, or individual labor contracts. If, for instance, a plant must be closed down as a result of the war, the Trustee is empowered to dispense with or shorten the dismissal period, however established.[36] Savings that accrue to the employer must be delivered to the federal tax offices.[37]

Yet, the same War Economy Decree[38] also restricted the powers of the Trustees by freezing wages, salaries, and all other remuneration. The prohibition to raise the compensation of labor includes piecework, and is ruthlessly enforced.[39] But the wage freezing seriously lessens the one incentive on which the régime has relied to raise the productivity of labor: the "performance wage" which has been applied even in the case of juvenile workers.[40] To exempt anyone from the wage-freezing order in order to stimulate production would have meant to sacrifice the very principle upon which the social and economic policy of the war régime rests. It would have unfettered a serious competition for manpower among the business

[33] Some trustees apparently believed that the Decree of June 25, 1938, authorized them to interfere with specific labor contracts. One such case is reported by Meissinger, (1938) DER DEUTSCHE VOLKSWIRT No. 46. The problem is discussed by Lutz Richter, *Zum Aufgabenkreis des Reichstreuhänders* (1938) 47 SOZIALE PRAXIS, No. 17, p. 1067.

[34] *Verordnung zur Abänderung und Ergänzung von Vorschriften auf dem Gebiete des Arbeitsrechts* (Order amending and supplementing Orders relating to labor law), R. G. BL. pt. I, 1683.

[35] *Id.* 1609.

[36] First Administrative Orders under the War Economy Decree of Sept. 16, 1939, R. G. BL. pt. I, 1869, and 1 POSSE ET AL., KOMMENTAR, pt. II, *Kriegslöhne und -urlaub*, 6-11.

[37] Decree of Oct. 11, 1939, R. G. BL. pt. I, 2053; 1 POSSE ET AL., KOMMENTAR 11-13.

[38] Second Administrative Orders of Oct. 12, 1939, R. G. BL. pt. I, 2028; 1 POSSE ET AL., 14-20.

[39] No bonuses may be granted if not granted before Nov. 16, 1939 (1939) REICHSARBEITSBLATT, pt. I, 544. Interest rates paid by plant savings bank may not be increased. March 8, 1940, (1940) *id.* 447.

[40] On performance wage, see BEHEMOTH 432-433; on piecework for juveniles, see (1941) 50 SOZIALE PRAXIS 251.

combines, would have threatened the price structure and, perhaps, even paved the way for inflation. The ingenious device used by the régime was to lower the maximum wage if the performance of the worker slackens[41]—so that a minimum effect of the performance wage may be achieved without abandoning the wage-freezing policy.

We may add, in this connection, that the War Economy Decree also abolished the additional payments for overtime, Sunday, holiday and night work, that all provisions for granting holidays, whether in statutes, wage and plant regulations or individual agreements, were abolished—but that shortly afterwards all these provisions were restored, with the exception of the additional payments for overtime for the 9th and the 10th hours.[42]

This whole policy does not seem to have been very successful. The insignificant result achieved by the stabilization of wages will not surprise us, if we consider the social basis of National Socialism. Even the most authoritarian régime, even the placing of SS men behind each worker, will never achieve a maximum of production. The lessons of the coal industry clearly teach that[43]—as well as the migration from agriculture to industry which will be discussed below.

To be sure, no quantitative statements can be made as to how far the undoubted drop in productivity is due to physical exhaustion, to opposition, or to the introduction of over- and under-aged people in the process of production. Yet the incessant strengthening of the terroristic apparatus makes it likely that the slowdown is as important a factor as are physical and economic necessities. The War Economy Decree made it a crime, punishable with imprisonment or even death, to destroy, damage, take away, or hoard raw material or products if by such acts the satisfaction of the population's needs is maliciously impaired. The People's Court had previously ruled that the betrayal of plant secrets may constitute treason to the country and would be punished by death.[44] The third administrative order[45] extended the penal power of the Trustees who were authorized to mete out unlimited fines without being compelled to go to the criminal courts.

As compared with the power of the Trustees, that of the Labor Courts is really insignificant.[46] Their jurisdiction is limited to disputes between an employer and his employees or between employees arising from group work. They still have a

[41] This power was vested in the Trustees in the fall of 1941. See Frankfurter Zeitung, Sept. 28, 1941.

[42] See BEHEMOTH 346-348.

[43] Production per shift in the Ruhr valley developed as follows: 1932 (depression year), 2093 kilograms; 1936 (Four Year Plan starts), 2199 kilograms; 1937, 2054 kilograms; 1938, 1970 kilograms (—11%). This occurred in spite of the fact that the number of miners was increased by 20,000. Even the total production of coal did not adequately develop. 1932, 104.7 million tons; 1936, 158 million tons; 1937, 184 million tons (Saar and Austria included); 1938, 186.4 million tons (Saar and Austria included). See (1939) 48 SOZIALE PRAXIS 395.

[44] *Volksgericht* (Peoples' Court), First Senate, April 15, 1937, in (1937) ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 410.

[45] Issued Dec. 2, 1939, R. G. BL. pt. I, 2370, and 1 POSSE ET AL., KOMMENTAR 29-30.

[46] A very detailed and accurate study has been made by Cole, *National Socialism and the German Labor Courts* (1941) 3 J. OF POLITICS 169-197.

rational organization and a rational procedure. But in actual practice, their limited powers dwindle to almost nothing. For, according to Section 11 of the Labor Courts Act of April 10, 1934,[47] legal representation before the Labor Courts is a monopoly of the Labor Front. Only employees of the Labor Front normally may appear before Labor Courts; members of the bar may appear only in exceptional cases if admitted by the Labor Front. And the Labor Front grants assistance before Labor Courts only if "the intended law suit is (a) expected to be successful, and (b) does not contradict National Socialist principles and the principles of honor of labor."[48] Since these principles change according to political exigencies, it is almost impossible to say whether a worker or an employer, possessing certain rights, can assert them.[49]

Even less significant are the Social Honor Courts,[50] intended to punish violations committed by employers and employees against the honor of labor and of the plant community spirit.[51] They are rarely invoked against employees since the procedure is costly and cumbersome and since the régime possesses cheaper and swifter means of terrorization: the concentration camp, the army, the Todt organization, the People's Courts, the special tribunals. The main purpose of the Social Honor Courts is to terrorize the small businessman who is often unable to cope with the terrific amount of regimentation of the labor market and whose punishment is celebrated as proof of the régime's "social consciousness."

2. *The Labor Front*

Side by side with the state institutions designed to control the labor market, the Labor Front operates as a mere party organization.[52] It is neither a trade union nor a federation of trade unions, nor a corporate body standing above and between employers and employees. It is rather an inarticulate body comprising all the so-called *"Schaffende"*[53]—that is, all persons engaged in work, workers, salaried employees, free professions, farmers, employers, who are either directly or collectively affiliated. The Labor Front is divided into *"Reichsbetriebsgemeinschaften,"* national plant communities, but these plant communities are not lower organizational units of which the Labor Front is composed,—the members of the Labor Front are not

[47] R. G. Bl. pt. I, 319.

[48] *Rechtsschutz-Ordnung der Deutschen Arbeitsfront*, c. II, reprinted in ROHLFING UND SCHRAUT, DIE ARBEITSGESETZE DER GEGENWART (Berlin & Leipzig, 1938) 337-340.

[49] On the legal aid business of the Labor Front, *cf.* Werner Hellwig (Director of the Office of Legal Aid in the Labor Front) (1939) 48 SOZIALE PRAXIS 769.

[50] They are very accurately analyzed by Pelcovitz, *The Social Courts of Honor of Nazi Germany*, (1938) 53 POL. SCI. Q. 350-371.

[51] They are based on §§35-55 of the Charter of Labor.

[52] The Labor Front is a party organization, under the financial control of the party treasurer, Franz Schwarz. See BEHEMOTH 80-83. The legislative acts on which its activities are based are: the "Unity Act" of Dec. 1, 1933, R. G. Bl. pt. I, 1016, as amended on July 3, 1934, R. G. Bl. pt. I, 529, and the administrative order issued under it on March 29, 1935, R. G. Bl. pt. I, 502, as amended on Dec. 5, 1935, R. G. Bl. pt. I, 1523, and Jan. 12, 1938, R. G. Bl. pt. I, 36.

[53] *Bestimmungen über die Zugehörigkeit zur Deutschen Arbeitsfront*, reprinted in ROHLFING UND SCHRAUT, *op. cit. supra* note 48, 333-337.

members of the plant communities[54] but solely of the Labor Front as a whole. The plant communities are merely administrative departments of the central administration of the Labor Front.[55] It is true that ever since 1935 there have existed institutions integrating the Labor Front and the central business organization, the National Economic Chamber, established by the foundation of the National Labor and Economic Council. But this body and its regional and local bases have never once functioned; in fact the sole purpose of their creation by the so-called Leipzig agreement[56] was to deprive the Labor Front of its economic activities which were entrusted to the National Economic Chamber at the top and to the provincial economic chambers in the middle level.

What then is the Labor Front? It is best to start with what it is not. It is not a union; it does not fix wages or labor conditions; it is not a state organ and thus has no control over labor supply. Its purpose, in the words of the Decree of October 24, 1934, on the Nature and Aim of the Labor Front,[57] is "the formation of a real people's and performance community of all Germans." It is thus an "educational" institution, a party organ that indoctrinates and terrorizes. All its economic and social functions are derived from authority granted by the state, such as its part in enacting wage regulations, in the legal representation before Labor Courts, in appointing works councils, in checking the remuneration received by home workers, etc. The Labor Front does not shape policies, it only carries out one aspect of the régime's labor policy; it manipulates the workers, drives them on, entices, terrorizes, and indoctrinates them. The role of the Labor Front is best expressed by the Decree of December 28, 1939, on the Administration in Rural Units,[58] where administration is left to the civil service and the *"Menschenführung,"* the manipulation of the masses, to the party. It would be fatally wrong, however, to underestimate this function, which today is more vital than ever before. In a period of slackening performance, population mixture, and military strains, where economic and social necessities forbid the use of economic incentives, the slave driver is the most important figure in the process of increasing output.

It is this job that the Labor Front performs. It operates through its numerous bureaucracy, through its Strength Through Joy Department, and through non-bureaucratic bodies forming élites within the working classes for the purposes of playing off one small group against the mass and of placing stool-pigeons within each plant, shop and public administration. These terrorizing agencies are the

[54] This point is stressed in the authoritative book by WILLY MÜLLER, DAS SOZIALE LEBEN IM NEUEN DEUTSCHLAND (Berlin, 1938) 86.

[55] There are now 16 such plant communities. Compare, on the organization of the Labor Front, Cole, *The Evolution of the German Labor Front* (1937) 52 POL. SCI. Q. 532-558, and BEHEMOTH 413-419.

[56] On this agreement of March 21, 1935, between the Leader of the Labor Front and the Ministers of Labor and Economics, compare Cole, *loc. cit. supra* note 55, BEHEMOTH 416-417, and BRADY, THE SPIRIT AND STRUCTURE OF GERMAN FASCISM (New York, 1937) 127-139.

[57] Reprinted in ROHLFING UND SCHRAUT, *op. cit. supra* note 48, 327-329.

[58] See BEHEMOTH 72.

Councils of Trusted Men, established on the basis of the Charter of Labor, the Plant Troops, and the Political Shock Troops.[59]

3. *The "Combing-Out Commissions" and the Deputy for Labor Supply*

Yet the machinery consisting primarily of the Ministry of Labor with its labor exchanges and its Trustees, on the one hand, and of the Labor Front, on the other, did not assure a sufficiently streamlined organization for the full control of the labor market. Two more bodies have been created: "combing-out commissions," apparently in the spring of 1941, and a general deputy for labor supply in the spring of 1942.

The combing-out commissions[60] are either national or regional. The former, composed of representatives of the Reich ministries, investigate big plants; the latter comprise representatives of the labor exchange, the armed forces *(Rüstungskommandos)*, the economic offices *(Wirtschaftsämter)*, and the provincial economic chambers. Only rarely do they include a Labor Front official—thus revealing the low regard in which the régime actually holds the Labor Front. The purpose of the commissions is very well defined by their name. They investigate plants, study their output, capacity and the necessity for coordination. If they find that a plant uses labor inadequately or is superfluous in the war effort, the workers are "combed-out," that is, ordered to leave and to take work elsewhere. The legislative basis will be discussed later.

The culmination of authoritarian control was reached in the spring of 1942 with the appointment of a general deputy for labor supply who utilizes on the regional level the *Gauleiter* (district leader) of the party. The appointment was made[61] on the authority of the Four-Year-Plan Decree of October 18, 1936.[62] The post parallels that of a general deputy for the rationalization of German industry created shortly before. Fritz Sauckel, district leader of Thuringia, was chosen as the new labor dictator. No better selection could have been made, for Sauckel represents in his person the major groups of the ruling class: industry, party and bureaucracy. He is an industrialist of no mean standing who controls the National Socialist Party's Wilhelm Gustloff Foundation operating six rich industrial firms.[63] He is a party district leader and thereby a powerful party hierarch; he is also a high SS leader (SS *Obergruppenführer*) and thus belongs to the inner circle of the leadership of the practitioners of violence. He can thus balance the antagonistic forces: the claim of industry for more foreign workers and that of his boss Heinrich Himmler, in his capacity of Reich Commissioner for Strengthening Germanism in the East, for retaining the skilled workers in the East.[64] He has the concentra-

[59] For a fuller discussion of these institutions, see BEHEMOTH 422-425, 417-418.

[60] See report in the Frankfurter Zeitung, May 18, 1941.

[61] Decree of March 28, 1942, in 6 DER VIERJAHRESPLAN (1942) 198.

[62] R. G. BL. pt. I, 887.

[63] On the history of this combine, see BEHEMOTH 303-304.

[64] Exemplified by Administrative Order of the Minister of Labor, May 24, 1940, (1940) REICHSARBEITSBLATT, No. 20, pt. I, 350, in which the Labor Exchanges are ordered to heed the request of Himmler for artisans.

tion camps at his disposal to punish recalcitrants. He is thus superimposed on the Minister of Labor, Franz Seldte, a nonentity without influence who has been retained merely because German ministers are not makers of policies but simply tools carrying out the commands of the leadership. The district leaders are superimposed on the provincial and local labor exchanges.

The institutional framework for the control of labor in Germany proper is thus complete. We have now to turn to a study of the devices for insuring an adequate labor supply.

III. DEVICES FOR ASSURING AN ADEQUATE LABOR SUPPLY

The labor supply situation in 1933, when Hitler came to power, in some ways facilitated, and in some ways obstructed, the execution of the rearmament program. The severe unemployment of the depression period[65] had created a reserve army from which millions of workers could be transferred into armament production. But the depression had also created very serious handicaps. Skill had been neglected, fewer apprentices had been trained, skilled labor had emigrated, especially from the mines, metallurgical industries, and building construction.

The first tasks were to concentrate labor exchange and to inventory the labor reserve as well as the working population. The Act of November 5, 1935,[66] gave the Reich Institute exclusive power over labor exchange, vocational guidance, and the hiring of apprentices. As far as private labor exchange activities were admitted, they were transformed into agents of the Reich Institute.[67]

The inventorying of labor was the second step. The existing statistical services, though much more complete than in the United States, were still inadequate. The number of employed could be approximately estimated on the basis of the contributions to sickness, invalidity, and salaried employees insurance institutions. Unemployment was known through the statistical services of the Reich Institute and of the trade unions. A complete survey of available skill and training was lacking. It was created by the introduction of the work book[68] for specific industries, which was gradually extended until it covered the whole population with minor exceptions.[69] The book contains a full vocational record, listing the training, specialization, beginning and end of each employment period, and, in addition, data on air pilot licenses and familiarity with agricultural work. The book has to be handed over to the employer who makes the necessary entries. It is issued to the employee by the labor exchange which transfers the entries on cards. As early as the fall of 1936, 22 million books had been issued and the extension in 1939 necessi-

[65] Registered unemployed in January 1932: 6.042 million; to this must be added an unknown number of "invisible unemployed," estimated at about 2 million. See BEHEMOTH 475.

[66] R. G. BL. pt. I, 1281.

[67] Administrative Order of Nov. 26, 1936. R. G. BL. pt. I, 1301.

[68] Act of Feb. 26, 1935, R. G. BL. pt. I, 311.

[69] Decree of April 22, 1939, reprinted in F. SYRUP, DER ARBEITSEINSATZ IM VIERJAHRESPLAN (Berlin-Vienna-Leipzig, 1940) 120-130.

tated the issuance of an additional 14 million books; 8.5 million were issued on June 30, 1941.[70]

1. *The Major Acts and Decrees*

The best way to present the rather complicated legislative development is first to survey the major enactments.[71] We mention the following:

1. The Act of May 15, 1934, for the Regulation of Labor Supply,[72] as amended February 25, 1935,[73] of which the main provisions authorize

(a) prohibition of the employment of persons not domiciled in the region of their prospective employment;

(b) measures to fight the depletion of agricultural labor supply.

2. The Decree of August 10, 1934, for the Distribution of Labor Power[74] vests the total power of allocation and exchange of labor in the president of the Reich Institute.

3. The Seven Decrees of November 7, 1936,[75] dealing with

(a) securing an adequate supply of skilled labor in the new generation;

(b) securing an adequate supply of metalworkers for politically important tasks;

(c) reintroducing metal and building workers into their previous trades;

(d) registering building construction projects before commencement of construction;

(e) reemploying older salaried employees (of 40 years and more);

(f) forbidding the use of code in "help wanted" advertisements;[76]

(g) granting employers in the metal industry, in building construction, in the brick industry, and in agriculture, the right to retain the work books of workers who leave their positions before the end of the notification period.

4. The Decrees of February 15,[77] and December 23, 1938,[78] dealing with agricultural labor and housework;

5. The registration on March 1, 1938, of students about to leave school;[79]

6. The basic Decree of February 13, 1939,[80] establishing conscription of labor and

[70] Beisiegel, *Labor Redistribution in Germany* (1942) 45 INT. LAB. REV. No. 4, pp. 395-401. The writer is a high official in the Reich Institute, and his article is a translation of his paper in the *"Reichsarbeitsblatt."*

[71] Problems of labor time, relief legislation and unemployment support will not be discussed here in this article. Extended discussion of women's labor is also omitted. *Cf.* BEHEMOTH 341. The number of employed women in 1933 was 4,700,000, in 1938, 6,300,000, and in January, 1941, 9,400,000. The 2,000,000 added since 1938 came primarily from household work. According to the Census of 1939, *supra* note 9, there were 21.7 million women without occupation, among whom were 11 million children below fourteen years of age, so that about 11 million could work. Since the majority is urgently needed for household work, there was in January, 1941, a possible reserve of between 2 and 3 million women. (1941) 20 DIE WIRTSCHAFTSKURVE, No. 2, pp. 148-150. The figures do not say much, since apparently even children are being mobilized.

[72] R. G. BL. pt. I, 311.

[73] *Id.* 310.

[74] *Id.* 786.

[75] (1936) DEUTSCHER REICHSANZEIGER, No. 262, p. 1. For this analysis, the author draws on the commentary in SYRUP, *op. cit. supra* note 69.

[76] On Dec. 13, 1940, the Minister of Labor prohibited the use of the press and the radio for "help wanted" ads. (1940) REICHSARBEITSBLATT, Nos. 25-36, pt. I, 615.

[77] (1938) DEUTSCHER REICHSANZEIGER, No. 43.

[78] *Id.* No. 305.

[79] *Id.* No. 51.

[80] R. G. BL. pt. I, 206.

restricting the change of employment for certain professions, implemented by administrative orders of March 2 (amended July 27),[81] March 10,[82] and July 11, 1939;[83] 7. Upon the outbreak of war, the Decree of September 1, 1939, of the Ministerial Council for the Defense of the Reich.[84]

2. *The Apprentice Problem*

The most serious aspect of Germany's labor supply problem was and still is the lack of a new generation of skilled labor, especially of apprentices. The following table elucidates the gravity of the problem.

Year	*Juveniles leaving school*	*Year*	*Apprentice positions open*
1934	620,000	1933-4	155,675
1935	620,000	1934-5	211,790
1936	580,000	1935-6	282,290
1937	565,000	1936-7	365,858
1938	550,000	1937-8	441,356
1939	555,000	1938-9	582,600
1940	550,000		
1941	530,000		
1942	525,000		
1947	444,000		

Source: Stets, *Zur Nachwuchsplanung 1941* (1940) REICHSARBEITSBLATT, No. 28, pt. V, 482.

The change in the conception of the apprenticeship contract has not increased the apprentice supply; on the contrary, it has decreased it. Under the Weimar Republic, courts and collective agreements had considered the apprenticeship contract not only as an educational agreement but as a genuine labor contract, giving the apprentice all the rights that workers possessed. This achievement was destroyed by National Socialism. The apprentice is no longer considered a worker; his contract is now exclusively an "educational and training agreement."[85]

To overcome the scarcity of apprentices, a number of measures have been introduced. Their training period had gradually been shortened until the decree of March 7, 1940[86] prohibited any extension beyond three years.[87] Decree No. 5 of March 1, 1938, compelled all students up to 21 years of age leaving elementary, middle, and high schools to register two weeks before graduation with the labor exchange,[88] while Decree No. 3a of November 7, 1936, had already compelled plants

[81] *Id.* 403, 1330.
[82] *Id.* 1216.
[83] *Id.* 444.
[84] *Id.* 1685.
[85] See survey by Theodor Rohlfing, *Wandlungen im Lehrverhältnis*, in ZEHN JAHRE ARBEITSGERICHT (Berlin & Leipzig, 1937) 94-104. On the consequences of this change, see BEHEMOTH 432-433.
[86] R. G. BL. pt. I, 478; see (1940) 49 SOZIALE PRAXIS, No. 7, p. 200.
[87] How serious this step is may be gathered from statistics showing the average length of the training period: Of 190 industrial trades, 103 had four years training, 4 had 3½ years, and 83 had 3 years. Of 31 handicraft trades, 15 had 4 years training, 2 had 3½ years, and 14 had 3 years. W. Rühmann, *Drei Jahre Lehrzeit* (1938) 47 SOZIALE PRAXIS, No. 23, p. 1427.
[88] The form is printed in SYRUP, *op. cit. supra* note 69, at 87d-87e.

in the iron and steel industries and in building construction with ten and more employed to hire an adequate number of apprentices.[89]

3. *The Agricultural Labor Problem*

The agricultural situation, too, presented grave difficulties. Statistics show a considerable decline of the agricultural population (by 10.6% from 1933 to 1939) and the *"Landflucht"*—the flight from agriculture—continues steadily as is shown in No. 17 of the *Soziale Praxis* of 1941 which is exclusively devoted to a discussion of this problem. The flight from the countryside clearly demonstrates the collapse of the "blood and soil" ideology or, more accurately, it results from this policy. For the Hereditary Estates Act which leaves the farm unencumbered to one offspring only, drives the younger sons into industrial work. This, however, is not the sole cause. When National Socialists do not talk propaganda, they are usually intensely realistic and never deceive themselves. They admit that the primary cause of *Landflucht* is the lower wage scale of agricultural workers who are partly paid in kind *(Deputat)*. The investigation carried out by the Labor Front's Institute for the Science of Labor shows that the German people have no prejudice against the countryside as such, since workers do not migrate from industries located far away from big cities, but that *Landflucht* occurs exclusively among agricultural labor and is caused by the inadequacy of agricultural wages.[90]

Aside from the introduction of foreign civilian labor and war prisoners, the régime attempted to remedy the situation by the following measures: Act No. 1 of May 15, 1934, and amended February 25, 1935, gives the president of the Reich Institute the authority to order the dismissal of agricultural workers now employed in other trades; Decree No. 3g (of November 7, 1936) makes it impossible for agricultural laborers to leave their jobs before the expiration of the dismissal period; Decrees No. 4a and 4b of February 15, 1938, and December 23, 1938, prohibit the employment of unmarried females below 25 years of age unless they can prove by their work book that they have worked at least one year in agriculture or in a household *(Pflichtjahr)*.[91] The *Pflichtjahr* is, however, not the only institution which comprehensively introduces labor into agricultural work. We have to add the *Erntehilfe* (harvest help) under the auspices of the Hitler Youth for students of 10 and more years of age; the *Landjahr* (agricultural year) for juveniles who are being selected jointly by their school, doctor, labor exchange, national socialist welfare organization and Hitler Youth; the *Landdienst* (agricultural service) for the re-introduction of urban youth into rural life, organized by the Hitler Youth;[92] the *hauswirtschaftliche Jahr* (household year) for female juveniles introduced in

[89] Sections 8-10 of the *Reichsschulpflichtgesetz* of July 6, 1938, R. G. BL. pt. I, 799, fixed the compulsory attendance at trade schools at 3 years and, for agricultural apprentices, at 2 years.

[90] 1 JAHRBUCH 1939 (edited by the *Arbeitswissenschaftliche Institut der Arbeitsfront*) 389-414, esp. 404-407.

[91] Ilse Richter, *Pflichtjahr für Mädchen* (1940) REICHSARBEITSBLATT, No. 26, pt. V, 456.

[92] 1938—27,000 juveniles; 1940—18,400 juveniles. See *Landeinsatz der deutschen Jugend* (1941) 50 SOZIALE PRAXIS No. 17, p. 673.

1934 by an agreement between the woman's organization and the Hitler Youth, intended to train "household apprentices" who have to work in households, work which evokes no enthusiasm since the "apprentices" receive no wages except a little pocket money.[93] The deterioration of the health of the juveniles must be serious since it is admitted that the average age of the agricultural service boys and girls is steadily dropping.[94]

4. *Metal Industries and Building Trades*

Similar problems existed in the metal industries and in the building trades, and later developed in mining. Decree No. 3b of November 7, 1936, tried to solve the difficulty in the following manner. The additional employment of ten and more metal workers[95] was made dependent upon the consent of the labor exchanges which could grant it only if the work was deemed to be necessary for rearmament. Decree No. 3c of November 7, 1936, applied to metal and building workers. It ordered employers to inform the labor exchange whether they employed metal and building workers not actually working in their trade. The labor exchange had then to arrange for a transfer of such workers into their trades. Decree No. 3d of the same date[96] made it compulsory for private and public building contractors to register building projects above a certain size with the labor exchanges before starting construction.

5. *Labor Freezing and Conscription*

Apart from the three special problems of labor supply (apprentices, agricultural and metal and construction work) the general problem of allocating labor had to be solved. Decree 3e of November 7, 1936, compelled plants and public authorities with ten and more salaried employees to employ an adequate number of older salaried employees and to inform the labor exchange of the number of employed white-collar workers.[97] The basic problems, however, were the complete abolition of the freedom to hire and fire and the conscription of labor. Decree No. 6 of February 13, 1939, partially solved the first problem. Section II gave the Minister of Labor the right to make the dissolution of labor contracts dependent upon the consent of the labor exchanges. The Minister exercised his right for the following industries: agriculture, forestry, mining (excepting coal mining), chemicals, building materials, iron and metals. Shortly afterwards, coal mining was included. The same decree also authorized him to enact legislation making the hiring of labor dependent upon the labor exchange's permission.

This trend culminated in the war decree (No. 7 of September 1, 1939) which

[93] Else Lüders, *Die Dienstpflicht der Frau* (1938) *id.* 47, No. 22, p. 1347; in 1934 there were 3000 household apprentices; in 1935, 12,000; and in 1936, 10,000.

[94] (1941) 50 *id.* No. 17, p. 673.

[95] For exact definition of "metal industry," see SYRUP, *op. cit. supra* note 69, at 44-47.

[96] As amended on July 23, 1937. See *id.* at 62.

[97] Compare the administrative orders of April 15, 1937, elaborating the procedure and supplying data on the numbers involved. See SYRUP, *op. cit. supra* note 69, at 77a-77d.

forbade the dissolution of any kind of labor contract without the consent of the labor exchange and equally allowed the hiring of labor only with the exchange's express permission. Exempted from this latter provision were only agricultural enterprise and mines[98] and households with children below 14 years of age. The decree of May 20, 1942, finally, vested the right to dissolve a labor contract exclusively in the labor exchanges. The development is thus complete.

The counterpart to the freezing of labor to its place is the introduction of labor conscription by Decree No. 6 of February 13, 1939, which replaced that of June 22, 1938. It created the *Dienstpflicht,* compulsory labor. The labor exchange may conscript "inhabitants of the Reich territory." Aliens are exempt only if international treaties or "recognized rules of international law" provide for such exemptions. Two such types of conscription are distinguished: short-term and long-term service. In the first case, the employer of a conscripted worker has to grant him leave of absence. The labor contract thus does not lapse. In the second case, the old labor contract ceases. In both cases, however, the work of the conscripted worker is carried out on the basis of a labor contract, that is, the moment the labor exchange summons someone to take up work in a plant, a labor contract is considered as having been concluded so that all wage and plant regulations apply to conscripted labor.[99] Conscripted workers who are compelled to establish a second household, receive a *Trennungszulage* (separation bonus) of up to 19 marks a week,[100] while other regulations provide for support in atypical cases of hardship.

The number of conscripted workers, however, has never been very great. From June 1939 to June 1940, 1,750,000 conscription orders were issued, 1,500,000 for men, 250,000 for women. From the outbreak of the war to the end of June, 1940, only 900,000 short-term conscriptions were issued,[101] while in June, 1940, 350,000 persons and in 1941, 437,000 men and 174,000 women[102] were actually conscripted.

Quite a different problem was solved by the *Notdienstverordnung,* the Emergency Service Decree of October 15, 1938.[103] While labor conscription aims at introducing labor into productive work, the emergency service decree provides labor for meeting public emergencies, such as fire, floods, air raid damages, etc. The tasks are thus *"hoheitlich,"* as German administrative law calls them; they fall in the province of the police. In such emergencies, "inhabitants of the Reich territories" may be summoned to work. Exempt are members of the armed forces,

[98] On mines, see 1st Administrative Order of Sept. 6, 1939, R. G. BL. pt. I, 1690; 1 POSSE ET AL., KOMMENTAR, pt. II, *Arbeitsplatzwechsel,* 14.

[99] The 1st Administrative Order of March 2, 1939, and July 27, 1939, R. G. BL. pt. I, 403, 1330, contains detailed regulations. See also comments in 1 POSSE ET AL., KOMMENTAR 11-27.

[100] Administrative Order of Sept. 4, 1939, DEUTSCHER REICHSANZEIGER, No. 207, and 1 POSSE ET AL., KOMMENTAR 28-66, where the numerous detailed provisions are printed. The order applies also to cases where workers are transferred due to a shut-down of a plant. See Decree of March 21, 1940, R. G. BL. pt. I, 544.

[101] (1940) 49 SOZIALE PRAXIS, No. 17, 543. [102] Beisiegel, *supra* note 21, at 396.

[103] R. G. BL. pt. I, 1441. The discussion here follows 1 POSSE ET AL., KOMMENTAR, pt. I, *Notdienst,* 1-53.

the labor service, the custom guards, the police, the "troops at disposal" and the "death-head formations" of the SS,[104] and some groups in the air raid service. The emergency service is again either a short-term or long-term service. But—in contrast to conscripted labor—it is carried out not on the basis of private but of public law. No labor contract exists between the emergency service worker and his employer. Hence, he receives no wages but support, which is graded according to the income of the emergency service worker[105] and an equally graded indemnification for clothing, food and shelter.[106] The notice of July 8, 1939,[107] designates the officials who are permitted to request such emergency services. A report of the *Frankfurter Zeitung*[108]—if I am able to interpret it correctly—shows, however, that the Emergency Service Decree is misused for purposes completely alien to its nature. A new regulation orders especially the offices of the armed forces, of public administration, and of hospitals to dismiss their male personnel and to employ juvenile women workers. The order adds that these girls do not work under a labor contract, that they need not possess work books, and that their marriage is dependent upon consent of the authorities which—so it is added—will be rarely granted.

IV. THE USE OF ALIEN LABOR AND WAR PRISONERS

It has already been indicated that the mobilization of aliens plays a considerable role in the solution of Germany's difficulties. Three different problems must be distinguished: (1) The importation of foreign civilian labor into the German Reich, partly on the basis of international agreements (*i.e.*, Italy) and partly through conscription, that is, brute force (*i.e.*, Poland); (2) the utilization of war prisoners; and (3) the utilization of labor outside the German territory, that is, in the conquered lands. The three problems must not be confused. The ideological basis of the work by non-Germans is the new conception of international law which has done away with equality and protection of minorities and replaced them by the concept of the "folk group" which allows the German master to differentiate finely among the various national groups so as to give some more, some less, some no rights whatsoever.[109] The hierarchy is as follows: Jews; Poles; Ukrainians and Croats, Lithuanians, Estonians, Latvians, Czechs, French, Dutch, and Scandinavians; Slovaks; racial Germans without German citizenship; Germans. The hierarchy may change according to political exigencies and has indeed changed, as will be seen below.

1. *The Importation of Foreign Labor*

Within Germany all these groups work. They work on the basis of labor contracts and thus come under the provisions of German labor law and of the wage

[104] On these SS groups, see BEHEMOTH 69-70.

[105] See the table in 1 POSSE ET AL., KOMMENTAR 11h.

[106] Order of the Minister of the Interior of Oct. 13, 1939 and May 28, 1940, 1 POSSE ET AL., KOMMENTAR 38-43.

[107] R. G. BL. pt. I, 1204, and 1 POSSE ET AL., KOMMENTAR 12.

[108] Frankfurter Zeitung, Aug. 17, 1941.

[109] *Cf.* BEHEMOTH 160-171, 125-127.

and plant regulations, with certain exceptions. Jews are—in violation of the racial theory—drafted and work under labor contracts. They are nevertheless subject to special restrictions. The Reich Supreme Labor Court had already ruled that Jews cannot become members of the "plant community,"[110] and a ruling of the Minister of Labor clarified their legal position,[111] drawing the consequences from their exclusion from the plant community. They may not be appointed foremen, and do not receive wages on holidays (Mayday, New Year, Christmas, etc.). They are not entitled to family allowances, nor to pregnancy bonuses, nor may they receive dismissal indemnities and separation bonuses[112] if their wages are high enough. They cannot get Christmas or other bonuses, nor have they the right to demand wages in case of air raid alarm. Only once a year may they go home to their families. They are subject—as are the Poles—to a *Sozialausgleichabgabe,* a special additional tax of 15% of the wage exceeding 39 marks monthly.[113]

This treatment meted out to Jews and Poles has, however, been extended in the spring of 1942 to all "folk groups" in the territory of the *Generalgouvernement* (occupied Poland). The preferential treatment of the Lithuanians, Latvians, Estonians and Ukrainians has ceased. They are now also subject to the 15% tax and are placed—whatever their training and skill may be—in the lowest wage class of their age and occupational group. Also all the other regulations applied to Jews are now applied to them. Only in one instance is their treatment better. They are taxed according to the size of their families whereas in the case of the Poles no such consideration is shown.[114]

Even this limited amount of rights is not applied to the inhabitants of occupied Russia. To Russians German labor law does not apply, even if they work inside Germany. The sole protection that the Minister of Labor found necessary to enact in their behalf was that deductions from their wages should be made in such a way that the workers retain, if possible, *20 Pfennigs per working day* as pocket money.[115] Jews have to wear the Star of David, Poles a P, and Russians an O (meaning Ost—East) on their sleeves. In order to counteract any sentimental feelings that decent German employers or civil servants may have toward these slaves, the Minister of Labor added: "It is the duty of the labor commissioner to watch that these workers are not, directly or indirectly, granted better working conditions then prescribed by the existing regulations."[116]

2. *The Utilization of War Prisoners*

The work of war prisoners does not come under the provisions of German labor law. It is slave labor pure and simple. Wages that have to be paid so as not to

[110] Judgment of July 24, 1940 (1940) DEUTSCHE JUSTIZ, No. 37, 1035.
[111] Dr. Hans Küppers, *Die vorläufige arbeitsrechtliche Behandlung der Juden* (1941) REICHSARBEITSBLATT, No. 6, pt. V, 106.
[112] *Ibid.*
[113] Decree of Dec. 24, 1940, R. G. BL. pt. I, 1666; (1940) REICHSARBEITSBLATT, No. 24, pt. I, 446.
[114] Order C III b, 3972/42 of Feb. 27, 1942, reprinted in I. T. F. BULL., No. 9, *Fascism,* May 4, 1942.
[115] *Ibid.* [116] *Ibid.*

prefer one entrepreneur to another, are paid to the *Stalag*, the administration of the war prisoners camps. According to a ruling of the Minister of Labor[117] war prisoners shall be employed in the following occupations and, if possible, in the following sequence: agriculture; melioriation; mining; railroad track work; construction and operation in synthetic rubber; hydrogenation and cellulose wool plants; roads and canals; brick factories and quarries; stable construction; turf work; transportation. Special labor exchange offices have been set up to find out the amount of skilled labor that is available.[118]

In spite of the political dangers involved, even Russian war prisoners have been set to work in Germany.

3. *The Utilization of Labor in Occupied Countries*

It is impossible to adequately describe the varied labor regulations prevailing in the occupied territories. They differ from country to country. In Poland and Russia they are plain slavery regulations, while in other parts of Europe attempts are still being made to establish Fascist- and German-dominated unions or labor fronts that help to enslave the working classes. The Bulletin of the International Transport Workers Federation on "Fascism" provides reliable material in abundance.[119]

V. FUTURE TRENDS

We have by no means covered the whole territory. Nothing has been said about the development of wages and the material and non-material gratification that the working class received. I have to refer the reader to my book and to a future study of these problems. It may suffice here to indicate the major trends in broad strokes. Wages have, as a rule, been stabilized on the depression level while in many cases (building construction) reductions have been made. Earnings have increased as a result of longer hours of toil—as National Socialists themselves admit. Deductions for taxes, contributions to social insurance institutions, Labor Front, party, and winter help average at least 26%, probably more.[120] Prices of consumption goods have slowly but steadily risen; compulsory saving has been introduced; accidents rise and physical exhaustion has begun to show. Income from wages and salaries fell steadily as compared with income from other sources.

A study of National Socialism reveals the picture of a terrorized, fully exploited working class. Had we the space, we could show by a number of instances that even the complete terrorization of the working classes by state and party has not

[117] (1940) REICHSARBEITSBLATT, No. 21, pt. I, 384.

[118] *Id.* 530, and Hölk, *Der Einsatz von Kriegsgefangenen in Arbeitsstellen* (1940) REICHSARBEITSBLATT, No. 21, pt. V, 353.

[119] The main lines of this policy are described in BEHEMOTH 171-183, and by Ernest Hediger, *Nazi Exploitation of Occupied Europe*, FOREIGN POLICY REP., June 1, 1942, which also contains an excellent bibliography.

[120] On wages, see (1940) 49 SOZIALE PRAXIS, No. 7, 223; on earnings, see (1940) REICHSARBEITSBLATT, No. 30, pt. V, 530; on deductions, see Charlotte Lorenz, *Verbrauchs-Haushalt und öffentlicher Haushalt* (1938) 47 SOZIALE PRAXIS, No. 19, 1197.

succeeded in completely suspending the laws of the labor market. The decline of production in coal mining and the subsequent legislation to increase productivity;[121] the migration from agriculture; the abolition of holidays, of overtime, night and holiday bonuses and their subsequent reintroduction;[122] Hitler's blast at the "acquired rights" of the German workers in his last speech and the appointment of Sauckel; innumerable devices of employers to improve the conditions of their workers—they all demonstrate that authoritarian control of the labor market, even where the means of violence are fully centralized, does not produce the best results. A democracy will not follow this course—for reasons both ideological and materialistic.

A number of probable consequences must be mentioned to round off the picture. The aims of National Socialism are clear. Dr. Friedrich Syrup, the former president of the Reich Institute and Secretary of State in the Labor Ministry, has frankly stated them: de-industrialization of the occupied territories and concentration of industrial production in Germany. The millions of workers from occupied Europe will have to continue to work for Germany. But—so Dr. Syrup insists—this "migration must not lead to a settlement of foreigners, to an unnatural mixing of European peoples and races." Therefore, the foreign workers must be separated from their families and see them only occasionally.[123]

The future New Order is thus nothing but the perpetuation of war conditions on a much larger scale. It is an order of slavery, tyranny and brutality. It is impossible to express in words the sufferings and the heroism of the exploited peoples.

One day this system will be destroyed from without and within. Will it be followed by a new nationalism? Will the outcome of the National Socialist New Order be a return to 19th-century nationalism? We believe the very opposite. Nationalism is in decay. The exploitation of the masses in Germany and Europe is not merely the work of the German ruling groups, of the party, army, big business and the high bureaucracy. Native capitalists, landowners and Fascists share the guilt and the spoils. Considerable sections of the native ruling classes have made their peace with the German conqueror and have even actively helped the conquest. The masses in Europe know that their terrorization is European and not merely German.

There is a second factor. The mass migration of foreign workers into Germany creates an entirely new political and psychological situation. Common work and common exploitation creates solidarity. Fraternization is frequent, partly out of pity, partly for political reasons, and the draconic punishment meted out for it merely illustrates the dread of the German conqueror before the common power of the European working classes.

[121] See BEHEMOTH 344-345.

[122] *Id.* 346-348.

[123] (1941) REICHSARBEITSBLATT, July 15, quoted from I. T. F. BULL. No. 16, *Fascism*, Aug. 5, 1941.

THE ORGANIZATION AND PROCEDURE OF THE NATIONAL WAR LABOR BOARD

E. RIGGS MCCONNELL*

During the last year the National War Labor Board has developed a set of procedures for handling labor disputes which is to some degree unique. The jurisdiction of the Board has been considerably extended by the President's Executive Order of October 3, 1942, and no doubt the procedures will be changed to some extent to meet the new administrative load.[1] However, it seems certain that the present system stands so close to the core of the theory on which the Board operates that whatever changes are made will have the system as a point of departure and for that reason it seems appropriate to outline the present procedures.

Legal Basis of the Board

The National War Labor Board was created by Executive Order No. 9017 issued by the President on January 12, 1942.[2] This Order provided that the Board would exist in the Office for Emergency Management which, of course, is an appendage of the White House. When the Order is winnowed down to its simplest terms it provides that the Board, within certain limitations and under rules promulgated by it, shall finally determine all labor disputes which might interrupt work that contributes to the effective prosecution of the war. From a procedural standpoint it is always important to bear in mind that the Board is an agency of the President, exercising the President's constitutional powers as Chief Executive and Commander-in-Chief of the Armed Forces. The courts have never had an occasion to review the Presidential powers specifically in this connection, and there is really no case law pertinent enough to warrant analysis. It seems clear, however, that the interruption of production by labor disputes falls so close to the kernel of the successful prosecution of the war that the Presidential powers are beyond dispute. In the last war, President Wilson created the old War Labor Board on the same theory, and his action consti-

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[1] The recent Executive Order of October 3, 1942, 7 FED. REG. 7871, provides that there should be no increases or decreases in wage rates resulting from voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, unless notice of such increase or decrease is filed with the National War Labor Board and unless the National War Labor Board has approved such increase or decrease. In brief, this Order increases the jurisdiction of the War Labor Board to include voluntary wage increases or decreases. It still retains its jurisdiction over labor disputes generally.

[2] 7 FED. REG. 237 (1942).

tutes the constitutional precedent on which the present Board is based.[3] At the present time there are no statutes which expressly implement the Board in any way.[4]

In addition to the Presidential power the Board is likewise bottomed on an agreement, between representatives of the two national labor organizations and selected representatives of industry, reached at a conference called by the President on December 17, 1941. Of course, no one seriously contends that this agreement was legally binding, in the strict sense of the word, upon all the various employers and workers in the country at large. However, it stands as a very firm moral basis for the Board's actions and is deemed extremely important because it signifies a basic adherence to democratic principles. The precedent for the agreement is likewise found in President Wilson's creation of the old War Labor Board. There was a conference and agreement then too.

From the nature of the Board's function as a determinator of disputes it operates with a great many of the indicia of a court. Its final decisions culminate in a Directive Order addressed to the parties to the dispute which in many respects has the character of a decree in equity. In addition to the Directive Order the Board likewise in many cases issues an opinion explaining its decision. Under the Executive Order, the Board's Directive Order, through clear delegation of authority, is in essence an order of the President under his powers as Chief Executive and Commander-in-Chief. In this respect the Board's position is quite different from that of the National Defense Mediation Board which preceded it. That board was given power merely to make recommendations to the parties which would be published at large so that the public might form an opinion of the merits of the dispute, to the end that it might be resolved at the bar of public opinion.

Jurisdiction of the Board

In Section 3 of the Executive Order, by clear implication the Board is given general jurisdiction over all labor disputes which might interrupt work that contributes to the effective prosecution of the war. This general jurisdiction is circumscribed in the Order itself in three different respects.

(1) Section 2 provides that the Order does not apply to labor disputes for which there are existing procedures for adjustment until those procedures have been exhausted. The National Mediation Board which is set up by statute to settle railway disputes exemplifies the type of agency contemplated by this limitation in the Order.

(2) Another limitation is found in Section 3 where it is provided that the procedure for settling disputes shall first embrace direct negotiations between the parties or resort to agreed collective bargaining procedure and that secondly the Commissioners of the Conciliation Service in the Department of Labor should be called

[3] Proclamation of President Wilson creating the National War Labor Board, April 8, 1918, quoted in Rice, *The Law of the National War Labor Board, supra* at p. 471 n.

[4] The Act of October 2, 1942, entitled *An Act to Amend the Emergency Price Control of 1942 to Aid in Preventing Inflation and for other purposes,* provides that any person who wilfully violates any regulation promulgated by the President under the Act relating to wages shall be fined not more than $1000. This section would seem to implement by penal action at least certain orders of the Board.

in to conciliate the dispute. If these two methods fail the Order provides that the Secretary of Labor shall certify the dispute to the Board which shall finally determine it. There is a proviso in the section, however, which operates to make the outlined procedure more precatory than jurisdictional. This proviso gives the Board power to assume jurisdiction on its own motion. As a practical matter the Board has found it necessary to exercise this power in a situation in which it would be a fruitless matter to require the earlier steps outlined in the Order.[5]

(3) Section 7 of the Order provides that nothing in it shall be construed as superseding or in conflict with the Railway Labor Act which set up the Railroad Mediation Board, the National Labor Relations Act, or the Fair Labor Standards Act and certain other acts which are relatively unimportant. Section 7, in the strict sense, limits the substantive power of the Board. That is to say, it cannot order action which would contravene the statutes.

The touchstone to the jurisdictional question as far as parties or types of businesses are concerned lies in the fact that in the ultimate analysis the Board, within the very broad limits outlined above, determines its own jurisdiction. In doing so, it has approached the problem very pragmatically. In essence the criterion has been twofold. Does the dispute in question really substantially affect the war effort[6] and secondly, is it necessary for the Board to use its offices to avert an interruption of production? In applying this pragmatic test the Board has assumed jurisdiction not only of disputes involving basic war industries but also of disputes involving hotels,[7] a laundry which was servicing an Army camp,[8] a dispute between fishermen and the owners of the fleet,[9] a large commercial mail order house,[10] processors of peanuts,[11] a city streetcar system,[12] and a variety of other types of business which would appear at first sight to be rather remotely connected with the war effort.

When the records in the cases are examined, however, it is clear that it should not

[5] In the Matter of General Motors Corporation the Board assumed jurisdiction prior to certification of a dispute involving overtime provisions of the existing contract between the Corporation and the International Union of the United Automobile, Aircraft and Agricultural Implement Workers of America. The Board, thereupon, on February 27, 1942 refused to pass upon the issue inasmuch as the adjustment machinery provided for in the contract had not been utilized.

On September 15, 1942, the Board, without certification, requested certain companies alleged by the United Steelworkers of America to be a part of the basic steel industry to show cause why the Board's decision in the case of the subsidiaries of the United Steel Corporation should not apply to their company. This assumption of jurisdiction was a departure from established methods of procedure but was considered a practical method for disposing of a large number of possible cases involving identical issues.

[6] The opinion in the Matter of Montgomery Ward and Company, Case No. 192, contains the completest treatment of the general jurisdictional question. In that case, Dean Morse, public member, stated: "the decisions of the Board show its position that the question as to what disputes do or do not 'interrupt work which contributes to the effective prosecution of the war' is not one which can be determined by the application of some hard and fast rule. The cases differ one from another in many respects, and, hence, the problem becomes one of balancing interests and passing judgment upon degrees of effects which the various disputes have upon the war effort."

[7] San Francisco Hotel Employees Association, Case No. 21.

[8] New Orleans Laundrymen's Club, Case No. 91.

[9] Federated Fishing Boards of New England and New York, Case No. 16.

[10] Montgomery Ward and Company, *supra* note 6.

[11] Four Peanut Companies at Suffolk, Case No. 500.

[12] Los Angeles Railway Corporation, Case No. 1.

be implied that the Board will assume jurisdiction of any dispute. One important criterion, but not a controlling one, is whether or not the particular company involved is under contract with the Government to deliver supplies. Another important factor lies in whether or not the particular dispute might spread and disaffect other workers in the community. In short, the question is always a factual one. It could be said, finally, that the Board has been liberal in its construction of its jurisdiction over parties.

With respect to subject matter, the Board has jurisdiction over all the various issues that might be classified as falling within the broad definition of a labor dispute. At the Industry-Labor Conference in December, 1941, the industry and labor representatives were at daggers' points as to whether or not the contemplated Board should have jurisdiction over the union security issue. And in the case involving the *Inland Steel Corporation*,[13] the company took the position that the Board did not have the authority to dispose of the union security question in that case. By unanimous decision the Board ruled that it did have such jurisdiction, and since that time there has been little argument with respect to the scope of the Board's power to dispose of types of issues.

With regard to the Board's position in relation to other agencies handling labor disputes, of course the National Labor Relations Board furnishes the cardinal example. The NLRB and the Board have established a liaison which has obviated any real conflict in the functions of the two Boards. The WLB in a number of cases has adopted a rule that it is bound by the decisions of the NLRB in its particular field even though those decisions are in the process of litigation.[14] In one case it ordered an employer to negotiate with a union certified by the NLRB even though the employer was prepared to contest the election by court proceedings.[15] The touchstone to the relationship between the two Boards lies, as stated above, in liaison. The WLB supplements the NLRB by its more flexible and more rapid procedure whenever it is determined that use of WLB procedure is desirable to avoid interruption of production. In one case the Board had before it a dispute which had gone through the National Mediation Board, but the owner of the railroad had refused to follow the recommendation of that board. In this situation there was little doubt that the procedures of the Mediation Board had been exhausted, and the Board ordered arbitration of the dispute under its direction.

In several cases the Board has expressed a reluctance to settle any dispute between a municipal governmental agency and its employees.[16] The expressed theory of the Board is that a governmental agency has within itself the authority to settle its own employment conditions and that the Federal Government should not enter upon such an area.

[13] Inland Steel Company, Case No. 35.

[14] Lebanon Steel Foundry, Case No. 333. In this case, a petition for a writ of certiorari is pending in the Supreme Court.

[15] Ohio Public Service Company, Case No. 169.

[16] Municipal Government City of Newark and State, County and Municipal Workers of America, CIO, WLB Release, March 5, 1942; Lower Colorado River Authority, Case No. 290; Turlock Irrigation District, Case No. 273.

From the decisions of the Board it is clear that, aside from sheerly jurisdictional matters, the Board concedes there is a very definite limit to its authority growing out of existing law and particularly the federal system. Thus, in an early case the Board refused to consider a question which had been previously adjudicated by a court of competent jurisdiction in California.[17] By negative implication it has indicated a policy of not ordering any action which would be a breach of an existing contract except under very exceptional circumstances[18] and it has likewise been careful that the actions ordered do not violate any existing state or federal statutes.[19]

As yet the Board has not taken any cases involving agricultural workers, and at present it is a matter of doubt whether or not the Board on grounds of policy would exclude agricultural disputes although the Executive Order seems broad enough to include them.

Organization of the Board

From an operational point of view the Board functions in four different groups: (1) The Board itself; (2) associate members and *ad hoc* mediators; (3) staff mediators and investigators; (4) incidental referees and arbitrators.

The Board itself is composed of 12 members; four representing the public, four labor, and four industry. The industry and labor members each have an alternate. All the members are Presidential appointees. The public members reside in Washington where the Board has offices in the Department of Labor. The Board holds regular meetings on Tuesday of each week, the meetings running through to the end of the week. Six members constitute a quorum of the Board provided that there is equal representation between employers and labor. A majority vote at any meeting determines a decision of the Board. The meetings are either in executive session, closed to the public, or in hearing sessions when the parties in exceptional cases present arguments to the Board. The hearing sessions are open to the public. The Board has a standing committee on new cases and a standing committee on procedure.

There are some 20 associate members who likewise are presidential appointees. Strictly speaking, the associate members are not members of the Board in that they are not entitled to participate and vote at Board meetings. In addition to the associate members, there are a number of *ad hoc* mediators who serve the Board with great regularity and stand in the same stratum as the associate members. Together these two groups either mediate particular disputes assigned to them or make findings of fact with respect to a particular dispute. There is equal representation among the associate members and the *ad hoc* mediators from the public, industry and labor. As a usual rule, they operate in panels of three with tripartite representation. In addi-

[17] Los Angeles Railway Corporation, Case No. 1.

[18] In the Matter of U. S. Steel Corporation, Feb. 27, 1942, the company had pressed a strong argument that a retroactive wage order would violate a contractual right. In its opinion the Board was very careful to point out that there would be no violation of the contract in that particular case and by negative implication it expressed a policy of not interfering with existing contract rights except under very exceptional circumstances.

[19] Federal Shipbuilding and Drydock, April 24, 1942, date of issue.

tion to the associate members and *ad hoc* mediators, the Board has a staff of mediation officers and investigators who are assigned to investigate or mediate particular disputes. The staff members usually operate alone. The Board likewise has a permanent list of men throughout the country who can serve locally as referees in any dispute and from time to time the Board directs the parties to submit a dispute to a local referee or arbitrator whose decision is subject to review by the Board.

The Board has an Executive Secretary who is charged with the responsibility of administering the affairs of the Board, and likewise an Administrative Associate Member who is primarily charged with the responsibility of administering the mediaton of cases prior to the time that they are finally put before the Board.

Procedure of the Board

Every effort has been made to keep the Board's procedures as fluid as possible. In this respect, the procedural theory of the Board differs from the procedures of the old War Labor Board which were more or less formal. There the parties were required to file complaints and answers and take various steps comparable to the procedural steps in a lawsuit. The present Board is trying to avoid formality as much as possible. The normal case, however, usually goes through a more or less regular procedure. The first action is taken by a committee composed of the Executive Secretary and members of the Conciliation Service, known as the Certification Committee. This Committee determines what disputes should be certified to the Board. When it is decided that a dispute should be certified, a certification is sent over the signature of the Secretary of Labor, briefly setting forth the facts about the dispute. There is likewise a report from the Conciliator who is familiar with the case. As soon as the case is certified, it is referred to the New Case Committee or Sub-Committee of the New Case Committee, which determines how the case should be handled. At this stage, one of four things might be done:

1. If the case involves a simple issue or a question of jurisdiction or requires some interim Board action, it is immediately put on the Board calendar and will be taken up by the Board in order, unless special circumstances make it desirable that it be given a preference.

2. If the case involves multiple issues and is relatively important, it is placed on the mediation docket and a panel of associate members or *ad hoc* mediators is assigned to mediate the case. Dates are set for the hearings, the Executive Secretary notifies the parties, and thereafter the mediation takes place. This either culminates in agreement on all issues or in the filing of a report by the panel setting forth the panel's findings and recommendations for Board action.

3. If the facts surrounding the case are obscure, the New Case Committee sends a staff member to investigate and mediate the dispute to the end that the Board may determine what procedure is best adapted to the particular controversy.

4. If the case primarily involves an issue of wages, the New Case Committee can refer the dispute to a local referee who subsequently holds hearings and makes findings. The referee's decision is subject to review by the Board.

When the dispute is placed on the mediation docket or is referred to the referee, the parties to the dispute are required to submit in advance a brief and concise statement setting forth their position. This statement is designed to limit the scope of the mediation or reference. The mediation proceeding itself is very informal. The public member presides and after allowing an opening statement by either side, conducts the proceeding along the lines which in the judgment of the panel are designed to bring the quickest results. In the event that the panel is not able to winnow down all the issues by agreement, it gathers together all the information which it deems pertinent and prepares a report for the Board. The report contains findings and recommendations. After the report is prepared, copies are sent to the parties and the case is put on the Board agenda. The Board thereafter considers the case and makes its decision in executive session. In exceptional cases, public hearings are held before the Board makes its decision.

Lawyers without a very definite background in labor law frequently feel like strangers in a strange land when they first come into contact with the Board procedure. Primarily this results from the fluid and informal method used by the panels Likewise the Board's lack of process or system of pleading seems strange to a lawyer

The Board does not adhere to the rules of evidence and there is no formal submission of proof under oath or examination of witnesses. There are three reasons for this: (1) the tripartite representation on the Board and in the panels to a large degree gives both sides the normal protection which the rules of evidence are designed to afford; (2) the nature of the issues in labor disputes does not lend itself to strict judicial proof; (3) from the nature of the disputes, the Board has to gather information itself from various investigations, utilizing to a large degree the government fact-finding agencies. Usually, both sides are given the opportunity to submit all that they care to submit in the way of documentary proof or oral testimony, and, if any real issue of fact comes up, the panel or the Board conducts an independent investigation.

Where there is a divided panel recommendation to the Board, or in exceptional cases where the Board feels it appropriate to have a public hearing, the parties are notified of the hearing and thereafter appear before the Board to present arguments. Many of the parties on their own motion have submitted briefs, and in some instances the Board has requested briefs. The hearing sessions are open to the public. As a usual rule, each side is given 45 minutes to present arguments.

Since the Board is an appendage of the White House, the President as Chief Executive and Commander-in-Chief of the Armed Forces enforces the Board's orders. In three instances, the orders of the Board have been openly defied, and the President promptly ordered either the Army or the Navy to take control of the plants and operate them until the difficulties had been resolved.[20]

Whether an order of the Board could be enforced by a court of equity is a question which has never been decided. It is clear, however, that a strong argument could be made that the equity jurisdiction would attach.

[20] Matter of the Toledo, Peoria and Western Railway Company, Case No. 48; General Cable Company, Case No. 247; S. A. Woods Machine Co., Case No. 160.

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